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THE

LAW OF EXECUTION

UPON

JUDGMENTS AND ORDERS

OF THE

CHANCERY AND QUEEN'S BENCH DIVISIONS OF THE HIGH COURT OF JUSTICE.

BY

C. JOHNSTON EDWARDS,

OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW.

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PREFACE.

THIS work is an attempt to supply a want long felt in the legal profession. Every practitioner has experienced the difficulty, after a judgment for payment of money has been obtained, of realising the benefit of it. No less a difficulty is met with in enforcing compliance, whether by attachment, committal, or sequestration, with a personal order of the Court. It is with the aim of explaining the practice in these matters that the author presents this work to the profession. The materials which have been collected together can only be found elsewhere by reference to numerous authorities and many books of practice.

Greatly extended remedies upon judgments and orders have resulted from the consolidation of the Courts under the Judicature Acts. The Rules of Court, though not altering the effect of much of the old procedure, have been framed, so far as possible, to assimilate the procedure in Chancery and at Common Law. The result has been to render many methods of execution directly available which could formerly only be put in force by expensive and dilatory proceedings. These methods naturally fall into the classes which have formed the basis for the main division of the work. Book I. treats of legal writs of execution, Book II. of process for contempt, and Book III. of equitable and statutory methods of execution, for enforcing the payment of money, by recourse to various kinds of property.

It has been found necessary to confine the work to matters generally in question between litigants. There is no attempt, therefore, to discuss the practice on enforcement of orders in

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bankruptcy (notably committal orders under the Debtors Act, 1869). Crown process, again, is omitted from consideration, and the punishment of persons in contempt in cases where it consists of a want of respect to the Court, or a breach of its disciplinary control over its officers, is left for treatises upon the law relating to the particular persons whom it affects. The subject of execution upon the judgments and orders of inferior courts has not been included.

Special attention has been devoted to execution against land. The complexity and uncertainty of the ordinary law on this subject form of themselves a justification for the appearance of a work in which it is considered. The effect of the bankruptcy of a judgment debtor is everywhere borne in mind. Execution against married women is discussed in a separate Chapter.

The many statutory enactments and Rules of Court which it has been found necessary to incorporate have been carefully verified. In the List of Cases care has been taken to give references to contemporary reports. The author has endeavoured to make the work as complete as possible by including all authorities reported to date. A number of practical forms will be found in an Appendix, as will also the recent Sheriffs Act of 1887.

The author desires to thank the many friends who have assisted him in the arduous task of passing the work through the press.

C. J. E.

Lincoln's Inn,
May, 1888.

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THE

LAW OF EXECUTION.

INTRODUCTION.

The subject of this work is of an eminently practical character. We propose to consider those rules of procedure and practice which are applicable to the rights of parties to litigation after the decision of the Court has been pronounced. Decisions of the Court are various in kind, both in respect of the subject-matter with which they deal, and of the form in which they are expressed. The methods of enforcing these decisions correspond with them; and it thus becomes essential that the different kinds of decisions should, at the least, be indicated, so as to form a basis for the classification or arrangement of our subject. We propose that this indication should be set forth in our Introductory Chapter, so that the theoretical meaning and effect of a judicial decision should be separated as far as possible from the practical methods adopted for enforcing it. To keep our path, without unnecessary trespassing upon the field of the jurisprudent on the one hand, or of the mere historian on the other, is a task of some difficulty. If, therefore, this part of our work appears to be meagre, and our conclusions unwarranted by the facts to which we refer, we demand that consideration which the limits of the space at our command justify us in asking.

Courts of common law and equity.

The Courts, which were by the Judicature Acts united and consolidated together, did not aim at attaining the

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same objects by the decisions which they pronounced. The Courts of common law were concerned with questions and rights which, by their constitution, courts of equity could not entertain. The courts of equity gave relief on grounds and principles of which the courts of law knew nothing. The theory of the jurisdiction and the methods of enforcing it were in each case distinct.

The action at common law.

The writ by which all actions were begun was the theoretical basis of the jurisdiction of the Courts of common law (*a*). The power of the judges, derived by commission from the sovereign, was limited by the terms of that commission to deciding (so far as civil proceedings were concerned) upon the litigation formally instituted before them by means of writs. The Court had to consider whether the facts proved before it, and stated upon the record by the writ and subsequent proceedings, entitled the plaintiff to the property he claimed. For the writs were always (*b*) limited in form, and every writ raised only a question of right in the plaintiff to certain tangible property, whether in the form of land or money. The judgment of the Court established or denied this right.

The writ and record.

Judgment at law, what it is.

This true nature of judgments at law is recognised by the highest authority:

"Judgment. *Judicium, quasi juris dictum*, the very voice of law and right, and therefore *judicium semper pro veritate accipitur*. The ancient words of judgment are very significant, *Consideratum est*, &c., because that judgment is ever given upon a due consideration of the record before them" (*c*).

We find also: "A man by his judgment authenticated his debt, and it gave an authority to the party to sue his execution within a year and a day" (*d*).

(*a*) Perhaps historically this is not quite correct, that is to say, correct without considerable explanation of the way in which the writ became of such great importance.

(*b*) Even after the Statute of *Consimili casu*.

(*c*) Co. Lit. 39a. *Recuperatur* is another form of commencement.

(*d*) Gilb. on Execution, 10.

More recently, (*e*) "A judgment at common law in an action for money, irrespective of any statute, is nothing more than a sentence of a Court of law, declaring the opinion of the Court that the plaintiff is entitled to recover a sum of money. That is the nature of a judgment, and execution upon it is merely the process of the Court causing the money to be raised out of the defendant's property" (*f*).

Consideratum est.

The form *Consideratum est* was followed until recently. A judgment at law contained a full recital of the pleadings in the action, then invariably there followed the words "therefore it is considered that the said plaintiff A. B. do recover against the said defendant C. D" the damages or land the subject of the proceedings (*g*). The modern form, instead of "It is considered, &c.," runs "It is adjudged, &c." (*h*).

It is adjudged.

In a proper and technical sense, therefore, a judgment of the Courts of common law was not a command, enjoining obedience on the persons whom it affected. Such was never the true view in which it was regarded. Further, it fulfilled the essentials of a command, in substance no more than in form. The verdict and consequent entering of the judgment by the judge were not adapted to express a direction involving a personal sanction upon any individual. The judges had no power by virtue of their office to order the performance of, or abstention from, any act. The parties to actions before them did not have recourse to the tribunal with the aim of obtaining any such relief.

The subject of dispute at law was always the right to estates in land or to money (*i*). In short, judgments at

(*e*) See judgment of Lord Redesdale, *East India Co.* v. *Kynaston*, 3 Bli. 153.

(*f*) Vice-Chancellor Kindersley, in *Bond* v. *Bell*, 4 Drew. 157.

(*g*) See, for example, the forms, Tidd's Practice, pp. 190 *et seq.*, 632 *et seq.*

(*h*) See Chitty's Forms, 12th ed. 376 *et seq.*

(*i*) The action of replevin, with the remedy provided thereon, is

common law were decisions relating merely to property, and its transfer from the possession of one person to the possession of another (*k*).

General nature of execution at law.

Such being the true meaning and effect of the judgment, it was enforced by strictly appropriate methods. Under the directions contained in writs (known as judicial writs), officers of the Court carried out the judgment by transferring the property, which was the subject-matter of it, from the unsuccessful to the successful party.

Arrest on mesne process.

It is true that prior to the act 1 & 2 Vict. c. 110, and for purposes of compelling appearance, the most stringent measures might be and were taken against defendants personally. Arrest on mesne process, which to the curious is an interesting study, was resorted to in ordinary actions.

The *capias ad respondendum*.

This right to arrest a defendant before judgment, under a writ of *capias ad respondendum*, to answer the plaintiff's claim, was given by certain statutes. In all cases where this writ was issuable before judgment, a writ of *capias ad satisfaciendum*, to enforce the payment of a sum thereby found to be due, also lay. This writ was theoretically no consequence of the judgment at all, and was entirely dependent upon the construction of certain statutes (*l*).

Capias ad satisfaciendum.

nothing more than an apparent exception. The writ enforcing the judgment was directed to the sheriff, the judgment being in the ordinary form.

(*k*) Austin proposed to deal with the subject of execution to some extent under the heading: "Judgments considered as modes of acquisition, that is to say, not merely as instruments by which rights of action are enforced, but as causes of ulterior rights: *e.g.*, as causes of liens or tacit mortgages given to plaintiffs on lands and moveables of defendants." Jurisp. vol. i. ed. 1861, p. ciii. Lord Chief Baron Gilbert (Executions, p. 2) says, that the King's Court immediately altered the property; but, with all submission, it cannot be said with truth that a judgment at law, apart from statute, was ever a mode of acquisition. The judgment presumed that the right to the subject-matter in dispute was older than the action itself, and pretended to be merely a judicial authentication of that fact. In the case of land, this view was altered by the construction placed upon the Statute of Elegit, for there, as will be seen, rights over the defendant's land were acquired by means of the judgment itself. *Vide infra*, p. 188.

(*l*) Tidd's Pr. 128, 1025. See *Cassidy* v. *Stuart*, 2 Sc. N. R. 432; *White* v. *Hayward*, 2 Ves. Sen. 461.

It is not proposed in this work to discuss the writ of *ca. sa.*, for the reason that its stringent remedy is, since the Debtors Act, 1869, available only in the cases of Crown debts, and perhaps of such penalties as are excepted from the operation of the statute (*m*).

Proceedings by rule *nisi*, order absolute, and writ of attachment.

Besides the judgment which was sought by the litigants in an action, there were other proceedings which could be taken against officers of the Court and certain other classes of persons (*n*). These proceedings were taken by rule or order *nisi*. A rule or order *nisi* called upon the person to whom it was addressed to appear before the Court, and show cause or reason why the rule or order should not be made absolute. These were originally the only interlocutory proceedings which could be taken in the course of an action at law. They were auxiliary only to the purpose of the action, and had nothing directly to do with the judgment or decision arrived at. A rule, in fact, has never been a part of the record (*o*). Besides the officers of the Court and those persons against whom a rule *nisi* and absolute could always be made, other parties might be affected thereby. It was always open, for example, to the parties before the Court to submit to an order embodying the effect of any agreement entered into between them. The agreement could then be made a rule of court, of which disobedience was a contempt (*p*). Undoubtedly, the effect of a rule of court, when made absolute, was that of a direct command. Where it was disobeyed, the disobedience was a contempt, punishable by attachment of the person. The writ of attachment, by which the process was effectuated, issued only after a rule

(*m*) Sect. 4.

(*n*) Tidd's Pr. 478. See Arch. Ch. Pr. 944.

(*o*) Tidd's Pr. 490. See *Newton* v. *Boodle*, 6 C. B. 532; 18 L. J. C. P. 73.

(*p*) The most frequent example of this practice is an agreement to refer to arbitration, but any agreement *in an action* might be made a rule of court, and summary process taken to enforce it. See, for an instance, an undertaking to reinstate a wall which had been pulled down. *Dodington* v. *Hudson*, 8 Moore, 510.

nisi for the specific purpose of showing cause why it should not issue had been made absolute, except in the one case where the contempt was committed in the face of the Court itself (*q*). All rules *nisi* and absolute are open to the observation, that they are not judgments in the sense of being decisions to obtain which the parties before the Court were litigating, but merely ancillary thereto.

Interrogatories.

Further, the Courts of common law had power to administer interrogatories, but this power was not a part of their ordinary and usual process (*r*).

Theory of equitable decrees.

In equity, no such basis of jurisdiction as a writ was required, the bill of complaint or petition which commenced proceedings being theoretically a petition to the fountain of justice, the sovereign himself. The question to be decided in a suit was not the right of the plaintiff to such or such property; machinery for trying that question was, as we have seen, already to hand in the Courts of common law. The real question to be decided, on the contrary, was whether relief should be granted to the plaintiff, by constraining the person of the defendant to do or abstain from doing some act. The question of right or title was not for decision by the equity tribunals.

Decrees in equity.

The decision itself was called a decree. This decree, unlike a judgment, was distinctly regarded as a command. The order or direction contained in it was not addressed to the fact that such and such had been ascertained to be the rights of the parties, but set forth in terms what was to be done by one or other or both of them (*s*).

(*q*) Blackstone observes upon the species of attachment by rule, "Indeed, the attachment for most of these species of contempt, and specially for non-payment of costs and non-performance of awards, is to be looked upon rather as a civil execution for the benefit of the party injured." 4 Comm. ed. 1876, p. 296. From this point of view the subject will be considered, *infra*.

(*r*) "It cannot have escaped the attention of the reader that this method of making the defendant answer upon oath to a criminal charge is not agreeable to the genius of the common law in any other instance." 4 Black. Comm. ed. 1876, p. 298; Tidd's Pr. 481.

(*s*) Following from this is the power of the Court of equity to

In the words of Lord Ellesmere:—"Note that a decree in chancery doth not bind the right of the party, but [not (*t*)] only his person to obedience; that if he will not obey, the chancellor may commit him to ward untill he do obey, and that is all which the chancellor may doe; but judgment given in the King's Court, Common Pleas, and other Courts of the common law, do bind the right of the party" (*u*). Nature of a decree—Lord Ellesmere.

The presumption at common law was that, by the decision, the rights of the party, the substantive question upon which the judges were asked to adjudicate, would be ascertained. The presumption in chancery was that the person was bound to fulfil the obligation imposed upon him by the decree, and that the decree had in itself nothing directly to do with the rights which might have formed the subject-matter of the dispute (*x*). Comparison of judgment and decree.

Suits in equity were of course not confined to matters of purely personal obligation, that is to say, to matters of conscience or duty alone. On the contrary, the bulk of the cases coming before the Court were in respect of relief relating to property in the hands, or which ought to have been in the hands, of one or other of the parties. The decree obtained in these cases was addressed to the performance of the duty in connection with the particular property in question. Distinct rights in equity came in consequence to be recognized with respect to land and things which, at the same time, were the subjects of entirely Nature of decree with respect to property.

mould its decrees. Their consequent "pliability," as compared with judgments at law, has been referred to as one powerful reason why the Court of Chancery absorbed so much business. 1 Sp. Eq. Jur. 390.

(*t*) The word "not" is in the original evidently misplaced here, it should appear as in the text.

(*u*) Ld. Ellesmere's Treatise, 62. See also 1 Sp. Eq. Jur. 391.

(*x*) This is well illustrated by the jurisdiction exercised of restraining persons by injunction from proceeding to enforce their rights at law, for the Court of Chancery did not attempt or profess to decide the legal rights of the parties, but restrained them on principles of equity, without deciding whether those rights which were claimed existed or not.

antagonistic rights at law. But notwithstanding this recognition of equitable property, the theory of the jurisdiction was strictly maintained, and the primary method of enforcing the decree was always by process directed against the person. It was originally only if the party, in disobedience to the decree, stood out and refused to be compelled to obey by the personal process issued against him, that recourse was had to his property. In some cases, the specific or particular property in respect of which the interference of the court had been invoked was made available for this purpose, in others the property of the disobedient person was taken possession of to constrain him (*y*).

Execution.

Illustration of *Equitas agit in personam*,— Sequestration.

A remarkable illustration of the strictness with which execution against property in specie, whether land or chattels, was regarded only as the secondary method of execution, is to be found in the case of sequestration. Where a person was so contumacious that he would not obey the decree of the Court, and stood out his contempt after being imprisoned, persons called sequestrators were appointed, who, authorized by writ, entered into possession of the whole of his property, and seized the rents and profits thereof. Yet even where sequestration was put in force in respect of disobedience to a decree to pay money, the proceeds of the sequestration could not originally be applied to the satisfaction of the sum due (*z*).

Application of legal modes of execution to decrees.

The nature of execution in equity being thus in its origin strictly personal, it followed that the methods resorted to at law to enforce judgments were not available for decrees. The converse was also true, that no process of execution known to the Court of Chancery could at the beginning of this reign be applied to legal judgments. However, by sect. 18 of 1 & 2 Vict. c. 110, decrees and

(*y*) For instances of this procedure, sec 1 Sp. Eq. Jur. 392. These methods of proceeding against property were characterised by Lord Coke as damnable, and great opposition was shown to them by the common lawyers.

(*z*) Dan. Ch. Pr. 6th ed. 909.

orders in chancery were given the force and effect of judgments; and by sect. 19, and the rules of court made thereunder, the issue of writs of *fi. fa.* and *elegit*, both strictly legal remedies, was authorized to enforce decrees for the payment of money. An important effect of this enactment is that, since its passing, the practice which formerly existed in chancery, of exhausting process by contempt or personal process before having recourse to the property of the defaulting party, has been considerably modified. Judgments at law were left untouched by the statute, and no method of enforcing them by constraining the person was given, nor could such a result have followed without altering the whole nature of the judgment itself.

Jurisdiction exercised for preserving property *in medio.*

Where disputes arose in chancery respecting the enjoyment or equitable ownership of property, the Court frequently by interlocutory order took steps for its preservation until the case could be heard or the decree obeyed. Courts of common law could not entertain any application for an order of the like nature, because they recognized only that certain rights in property existed, and that such were sanctioned or authenticated by their judgments.

Receivers.

The jurisdiction exercised by the chancellors in this particular took the form of appointing some responsible person as an officer of the Court, and he, subject to such directions as were given him by order of the Court, held the property *in medio* between the parties. It will be seen that this power of nominating persons as receivers has been turned to good account in the modern practice for enforcing judgments and orders.

Interlocutory orders and rules *nisi* and absolute.

The interlocutory decisions which were given in courts of equity were called orders. They were made for the purpose of obtaining evidence, or of bringing compulsorily before the Court all parties having claims in any given matter (*a*), or, as we have stated, of protecting the rights of the parties till the suit was ripe for decision. In this

(*a*) 1 Sp. Eq. Jur. 390.

respect, that they were ancillary merely to the main object of the proceedings, they resembled rules *nisi* and absolute at common law. The similarity did not end here, for, as will be seen, the remedies for disobedience to the rule absolute and to the interlocutory order were for many purposes identical. At the present time nearly the whole procedure by rule *nisi* and absolute is done away with, and all interlocutory process assimilated to form the modern interlocutory order.

Judicature Act.

The tribunals which formerly administered common law and equity were by the Judicature Act united and consolidated together. By that act the Supreme Court of Judicature was constituted, consisting of two great divisions—the Court of Appeal and the High Court of Justice. Every judge of the High Court is endowed with equal jurisdiction, and in him are combined the functions and offices of the various judges of the constituent Courts (*b*). The powers of the lords justices of the Court of Appeal differ only in the duty imposed upon them of hearing appeals from the High Court. The effect of the judgment or order pronounced is not altered by the act, and in every cause coming before the courts the nature of the relief granted depends entirely upon the particular kind of judgment or order to which the person seeking redress is entitled.

Use of term "judgment" in this work.

By the interpretation clause of the Judicature Act, 1873 (*c*), "judgment" shall include decree, unless in the subject or context of the Act there is anything repugnant thereto. We shall adhere to this nomenclature, and use the phrase "judgment or order" to express all final and interlocutory orders of the High Court. It must, however, be borne in mind, that the essential difference between a judgment and a decree, above pointed out, is

(*b*) See, for the nature of the jurisdiction of every judge, *Pinney* v. *Hunt*, 6 Ch. D. p. 100; *Clarbrough* v. *Toothill*, 17 Ch. D. 787; *Bradford* v. *Young*, 26 Ch. D. 656; *Salt* v. *Cooper*, 16 Ch. D. 544, p. 549.

(*c*) Sect. 100.

preserved in fact, though not in name. The powers of the old Courts were simply transferred to the newly-constituted High Court of Justice, which has, therefore, no power to change the nature of the judgment delivered. It would be, for instance, beyond the jurisdiction of the High Court, in an action which, before the Judicature Act, would have been an action for damages merely, to pronounce a judgment, "It is ordered that A. do pay to B.," and thereto to attach the consequences of a decree in equity, pronounced in a matter of which the Court of Chancery would alone have had cognizance (*d*). Bearing this in mind, we are able to place the proper limits on enactments which, otherwise, would seem to bear another construction. O. XLII. r. 3 of the Rules of the Supreme Court, 1883, is precisely in point when we come to consider the principle just adverted to. The Rule of Court is as follows:—"A judgment for recovery by, or payment to, any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction is transferred by the principal Act, might have been enforced at the time of the passing thereof." It would be an absurd conclusion (which, at the same time, would be a justifiable one, from the general language of the rule) to say, that a judgment for damages for breach of contract could be enforced by process for contempt; no such effect can be given to the rule. It must be read with due regard to the limits of the jurisdiction of the High Court, and to the essential difference between judgments themselves, according as they correspond with the old judgment or the old decree. The Judicature Acts have undoubtedly given power to every judge to pronounce a judgment which would formerly have been within the exclusive jurisdiction of the Court of Chancery, and the above rule shows that where such a judgment is given, having for its subsidiary purpose

Construction of O. XLII. r. 3.

(*d*) See, for an illustration, *Ex parte Hooson*, L. R. 8 Ch. 231.

the payment or recovery of money, all methods of execution, available on any judgment for the like purpose, may be resorted to. On the other hand, the rule allows the employment of some, though not all, methods of execution formerly peculiar to courts of equity, to enforce legal judgments where such methods were directed against property. This is for the reason that their employment does not alter the nature of the judgment itself. To illustrate: the appointment of a receiver interferes in no way with the judgment, and, therefore, can now be made with respect to legal property, notwithstanding that it might be reached by a common law writ in the hands of the sheriff (*e*).

Statutable means of execution.

The different means of execution, whose nature we have suggested, were not available for the realization of certain kinds of property. It therefore became necessary that other means should be invented, whereby such property might be reached in the hands of a judgment debtor, and applied for the payment of his debt. Statutable modes of execution were in consequence introduced, and form a considerable division of our subject.

Main plan of this work.

Preserving, so far as is possible, the principles whose outlines we have attempted to define, this work will be divided into three Books.

Book I. concerns execution on judgments and orders, corresponding with execution upon judgments at law.

Book II. concerns the enforcement of judgments and orders of which disobedience is a contempt.

Book III. concerns particular statutable and other remedies available against certain kinds of property.

Directory judgments and orders having no immediate sanction.

Before closing this chapter, it may be well to point out that there are many judgments and orders which effect their purpose without the necessity of execution being issued upon them. We speak of decrees or judgments in actions for foreclosure and redemption of mortgages, sale

(*e*) *Vide infra*, p. 321. *In re Pope*, 17 Q.B.D. 743, judgment of Cotton, L. J.

of property, appointment of guardians for infants, orders for partition, settling boundaries, and the like (*f*). In these cases, which are all of equitable origin, it is not usual that, in the first instance, any person should be directed to perform any act, but if the thing to be done were not carried out, the parties having the conduct of the cause or matter might be charged, or by further order expressly directed, to do the specific thing required. On this last-mentioned kind of order steps for enforcement by means of execution can of course be taken. It is, therefore, only when default has been made in carrying out the general directions of the Court, and a further specific order pronounced, that we are concerned with the matter, and then such further order is *sui generis* with those other judgments and orders upon which execution is due according to their terms.

Declaratory judgments and orders.

Besides these directory judgments and orders, there is another species which the Court is frequently called upon to pronounce, and which equally does not concern us.

From the nature of the jurisdiction at common law, it was formerly possible, by means of feigned issues (*g*), and other proceedings based on fictitious statements of fact, to obtain a judgment upon any point, which would in effect be a declaratory judgment or one impossible to enforce by any sanction. In equity, however, the principle was thus stated by Jessel, M. R.: "It was always the settled law of the old Court of Chancery, and it is therefore now the settled law of the Chancery Division of the High Court of Justice, that it is not the province of the Court to declare the rights of parties except in cases where immediate relief can be given" (*h*). And again: "No suit is entertained simply and exclusively for the purpose of deciding upon the nature and extent of future contingent rights without immediate

(*f*) Some of these orders contain specific directions, which are of course personal, *e. g.*, for payment of costs, and to that extent are enforceable directly.

(*g*) See 8 & 9 Vict. c. 109; sect. 19, 42 & 43 Vict. c. 59.

(*h*) *Hampton* v. *Holman*, 5 Ch. D. p. 187.

present relief" (*i*). But certain powers have been given to the Courts of Chancery for deciding questions when raised before them, although no relief is asked for. Take as instances the power of trustees to go to the Court under the Trustee Relief Acts, and the more general statutory enactment, 15 & 16 Vict. c. 86, s. 50, which is as follows:

"No suit in the said Court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Court to make binding declarations of right without granting consequential relief" (*k*).

It is clear that with these judgments, in respect of which the Courts give no consequential relief, we have, in the course of this work, little or nothing to do.

(*i*) Jessel, M. R., in *Kevan* v. *Crawford*, 6 Ch. D. p. 42. See, also, cases summarized, Dan. Ch. Pr. 6th ed. 791; 5th ed. 861. This does not, of course, imply any such proposition as that the Court would not pronounce judgment excepting where the right to execution must immediately accrue; it was always within the power of the Court to place conditions upon the immediate enforcement of its decrees.

(*k*) The nature of the questions which under this section the Court will decide, and the conjoint operation of the enactment with the Judicature Act, will be found discussed in *Cox* v. *Barker*, 3 Ch. D. 359, and *Bright* v. *Tyndall*, 4 Ch. D. 189. Comparing this section with the statement of the nature of equitable relief by Lord Ellesmere (*supra*, p. 7), it will be seen how it gave to the Court a new jurisdiction altogether.

BOOK I.

CONCERNING EXECUTION ON JUDGMENTS AND ORDERS CORRESPONDING WITH EXECUTION ON JUDGMENTS AT LAW.

Arrangement of the subject of this Book.

Execution upon judgments at law was carried out by means of writs. This Book is therefore concerned with writs of execution, and we shall attempt to follow an arrangement of our subject based, in the first place, upon the nature of the property to be recovered in accordance with the judgment, that is, whether it is land or money. As to judgments for recovery of money, the writs of execution applicable vary in their effect, according to the nature of the property which it is sought to make available for payment of the sum, or the nature of the personal remedy attempted to be enforced. The whole subject of this book may therefore be summarized as follows :—

An explanation of the general principles underlying all writs of execution, and the duties of the officers employed to enforce them :

The consideration of the different writs :

A. The writ for recovery of land :

B. The writs for recovery of money.

Under these last-mentioned writs recourse is had :—

To chattels and other tangible personal property of the debtor :

To the land of the debtor :

To the person of the debtor by imprisonment.

This last-mentioned process, however, although it may be said, so far as it is used to enforce the payment of money, to belong to the subject discussed in this Book, will be more appropriately treated of in Book II., under the consideration of process for contempt of court.

CHAPTER I.

WRITS OF EXECUTION GENERALLY.

THE subject of this chapter is divided into five sections:—

Sect. 1. Common law process by writ of execution.
2. General rules, including the Rules of the Supreme Court, relating to execution.
3. Change of parties to executions by devolution of interest.
4. Returns to writs of execution.
5. Discovery in aid of execution.

SECT. 1.—COMMON LAW PROCESS BY MEANS OF WRITS.

Nature of the jurisdiction.

We have seen that the scope of common law jurisdiction called into exercise in any action, was originally confined to questions of ownership or of title to property (*a*). This implies that certain kinds of property, and certain interests or estates therein, were alone considered as the possible subjects of rights. All judgments or decisions delivered affected none other but these kinds of property, and the person against whom the judgment had been obtained was affected only in an indirect manner. If the subject-matter of the dispute were land, the judgment declared the rights of the litigant parties in respect to it, and effect was given to the judgment by the transfer of the seisin or possession to the successful party under the direction of the sheriff. If the subject-matter of the dispute were a breach of agreement, or a wrong, the judgment directed compensation to be taken from the defendant and transferred to the plaintiff,

(*a*) In which general expression must be included the right to so much compensation or damages.

and effect was given to the judgment by realization of the sum recovered out of the property of the unsuccessful party.

The general character, therefore, of legal execution may be said to be, that it is concerned only with the transfer of legal property from the one litigant party to the other, in pursuance of the judgment or order pronounced (*b*).

Basis of procedure at common law.

From the earliest times, all procedure in the Courts of common law (*c*) was based upon a commission or delegation from the sovereign himself. The jurisdiction of the judges or justices depended then, as now, upon the authority given to them by their commissions of office, and has always been strictly confined to the limits assigned thereby. Again, in all civil proceedings the judges could take cognizance of such matters only as were brought before them under the authority of writs, which had to be sued out of the Chancery (the *officina justitiæ*) by the persons seeking redress. The writ, therefore, has from the earliest times formed the basis of all civil procedure in the Courts of common law (*d*). Writs have, with reference to their operative parts, always been of the same general form. They are commands, mandates, or precepts, directed to a person or persons in the name of the sovereign, and enjoining him or them to do or abstain from doing some act. They were framed to meet the different cases arising for decision, and therefore became very early in our legal history the subject of study amongst the most skilful lawyers. By them a system was elaborated of wonderfully terse and technical phraseology, and the whole judicature of the country appears at one time to have been confined within the bounds of these set forms of expression, which could not

Writs.

(*b*) The nature of execution by *ca. sa.* has been already touched upon, and shown to be in reality no direct consequence of the judgment itself; *supra*, Introduction, p. 4.

(*c*) Excluding, that is to say, the original local courts of the kingdom such as shire or county courts.

(*d*) See the very able note to 1 Reeves' Hist. Eng. Law, p. 145. There is an interesting and learned chapter on the writ process in Bigelow's Hist. of Procedure, p. 147.

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yield one jot to fit the circumstances of any particular case. If the case calling for redress could not be expressed in known legal terms it went without remedy.

Classification.

The elaboration of the system to which we have referred resulted in a classification of writs which is still frequently of the greatest practical value. All writs were divided into two classes, prerogative writs, and writs of right. It would be travelling too far out of our path to discuss the modern equivalents for prerogative writs (*e*). With writs of right, however, we have something to do. They were the ordinary writs used in process in all disputes between subject and subject, and were either original or judicial.

Original and judicial.

This is the distinction, which, notwithstanding the changes brought about by time, is still exemplified in every action pursued to execution. Formerly, the original writ, or the "original" as it was called, was the beginning or foundation of every suit (*f*). No action in the King's Courts could be commenced without it (*g*). And although new methods of commencing actions were devised (*h*), between those substitutionary methods and judicial writs the distinction was always preserved. Judicial writs are writs of execution. They did not, like original writs, issue out of the Chancery, but out of the

(*e*) For a recent case where the difference between prerogative writs and writs of right was touched upon, see *Reg.* v. *Churchwardens of All Saints'*, *Wigan*, L. R. 1 Ap. Ca. 611.

(*f*) 3 Bl. Comm. ed. 1876, 268, where it is pointed out that these writs are demandable of common right under Magna Charta, c. 29.

(*g*) 1 Sp. Eq. Jur. 225, 226. The register of original writs, which formed the subject of so much ancient ingenuity and learning, was the subject of the commentary of Fitzherbert in his Natura Brevium. (As to different earlier editions of this invaluable antiquarian work, see Nicholson's Hist. Libr. ed. 1776, p. 166.) See further, as to the nature of original writs, Tidd's Pr. 102. Original writs were, again, distinguished into *brevia formata* or *de cursu* and *brevia magistralia*, these last named corresponding with the writs framed under the Stat. Westminster II. (13 Ed. 1, c. 24), the statute known as *In consimili casu*. Co. Lit. 73b.; Tidd's Pr. 103; 2 Reeves' Hist. 112 *et seq.*

(*h*) It is said generally "by connivance of the judges." 3 Steph. Com. 509. For a fuller account, see Tidd's Pr. 37 *et seq.*, 102.

Court where the record was upon which they were founded (*i*).

Modern writ of summons, substitutionary for the original.

By a series of statutes, commencing with 2 & 3 Vict. c. 39, the whole process of commencing an action has been revolutionised, and made to depend, in all common law Courts, upon the issue of a writ of summons (*k*). At the present time, although the process by original and its equivalents have been supplanted by the writ of summons, the relative position of judicial writs has not changed. They are still founded upon the judgment or record. It is these judicial writs, which, under the name of writs of execution, it is proposed to discuss.

Sect. 2.—General Rules relating to Execution.

Sub-sect. (i).—*General Application of O. XLII.*

O. XLII.

The most important rules relating to execution are at the present time embodied in the Rules of the Supreme Court. O. XLII. concerns the subject of execution generally, and we are, therefore, most interested in its explanation. Most of the rules of this Order apply to all writs of execution alike, but the explanation and consideration of some of them is for convenience postponed till we come to those parts of our subject to which they most intimately relate.

Limits of O. XLII.

The order does not in any way limit the rights which persons may have to execution in cases not provided for.

O. XLII. r. 28.

O. XLII. not exhaustive.

By rule 28,—"Nothing in this order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever."

(*i*) 2 Wms. Saund. 5th ed. 38 (2), and see p. 27.

(*k*) See a short summary of the effect of the legislation prior to the Judicature Acts in 3 Steph. Com. ed. 1883, 508.

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It will be seen, particularly when we come to treat of the methods of enforcing judgments against equitable property, and of enforcing judgments and orders against the person, that they are not covered by the rules of this order. Hence the necessity for this rule 28 (*l*).

O. XLII. r. 8. Definition of writ of execution.

By rule 8,—"In these Rules the term 'writ of execution' shall include writs of *fieri facias*, *capias*, *elegit*, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the term 'issuing execution against any party' shall mean the issuing of any such process against his person or property as under the preceding rules of this order shall be applicable to the case."

This, which may be called the interpretation rule, does not call for any explanation. It may be remarked, however, that its application and construction may well give rise to differences of opinion (*m*).

Sub-sect. (ii).—*Conditions upon which Writs of Execution may issue.*

O. XLII. r. 24. Order to be enforced as judgment.

By rule 24 of the same Order,—"Every order of the Court or a Judge in any cause or matter may be enforced against all persons bound thereby, in the same manner as a judgment to the same effect."

This does not make an order equivalent to a final judgment for purposes other than those of execution (*n*). It is of importance to bear specially in mind that orders made in Chambers have to be entered as if they had been made in Court (*o*).

(*l*) See *Re Coney*, *Coney* v. *Bennett*, 29 Ch. D. 993.

(*m*) See the discussion, *infra*, on r. 19 of this order.

(*n*) *Ex parte Chinery*, 12 Q. B. D. 342, where a garnishee order absolute was held not to be a final judgment within sect. 4, sub-s. 1 (g) of the Bankruptcy Act, 1883. *Cremetti* v. *Crom*, 4 Q. B. D. 225; *Nott* v. *Sands*, W. N. (1883), 74.

(*o*) Cons. Ord. XXXV. r. 32; *Ballard* v. *Tomlinson*, 52 L. J. Ch. 656, where non-observance of the formality of entering was held to disentitle applicant to writ of attachment.

Where there is a judgment, execution may issue forthwith, not because there is a default, but because the debt is due as soon as judgment is signed; and notwithstanding that the judgment debtor is a man of undoubted solvency or wealth, the creditor is not bound to wait, even for a return of post (*p*). Where, however, on a judge's order that judgment should be signed for debt and costs to be taxed, in default of payment, and judgment was signed immediately after the demand of payment made to the clerk attending on the taxation, the judgment and execution issued thereon were set aside (*q*).

Execution may issue forthwith on judgment signed.

There are certain conditions, both with respect to the form of the judgment or order, and to the persons entitled or liable to execution, to be fulfilled before a writ of execution can be issued.

By O. XLII. r. 1,—"Where any person is by any judgment or order directed to pay any money, or to deliver up or transfer any property, real or personal, to another, it shall not be necessary to make any demand thereof, but the person so directed shall be bound to obey such judgment or order upon being duly served with the same without demand."

O. XLII. r. 1.

Demand before execution not necessary.

The service here mentioned is not by this order rendered necessary in cases where before the rules it was not necessary. "Upon being duly served" apparently refers only to cases of judgments or orders on which process for contempt can be taken (*r*). Demand *per se* was never necessary as a condition to enforcing a simple judgment (*s*).

Rule 2. "Where any person who has obtained any judgment or order upon condition does not perform or comply

O. XLII. r. 2.

Waiver of conditional judgment.

(*p*) *Smith* v. *Smith*, L. R. 9 Ex. 121. The debt becomes "authenticated by the judgment." *Vide supra*, p. 2.

(*q*) The judgment was said to be signed too soon. *Perkins* v. *National Assurance and Investment Association*, 2 H. & N. 71; *Cruikshank* v. *Moss*, 8 L. T. N. S. 439.

(*r*) *Land Credit Co. of Ireland* v. *Fermoy*, L. R. 5 Ch. 323. And see *Re* ——, *a Solicitor*, 33 W. R. 131.

(*s*) It was necessary, where stipulated for, before proceeding *to sign judgment* on warrant of attorney. Tidd. Pr. 546. See *Smith* v. *Smith*, L. R. 9 Ex. 121.

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with such condition, he shall be considered to have waived or abandoned such judgment or order so far as the same is beneficial to himself; and any other person interested in the matter may, on breach or non-performance of the condition, take either such proceedings as the judgment or order may in such case warrant, or such proceedings as might have been taken if no such judgment or order had been made, unless the Court or a Judge shall otherwise direct."

O. XLII. r. 9. Execution on conditional judgment.

Rule 9. "Where a judgment or order is to the effect that any party is entitled to any relief, subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the Court or a Judge for leave to issue execution against such party. And the Court or Judge may, if satisfied that the right to relief has arisen according to the terms of the judgment or order, order that execution issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties, be tried in any of the ways in which questions arising in an action may be tried."

Leave to issue execution in four cases.

When a judgment or order is pronounced, all methods of enforcing it are *primâ facie* available without its being necessary to obtain the leave of the Court (*t*). But that leave is required where the judgment or order itself imposes the necessity therefor (*u*), and also in the several cases which are enumerated in O. XLII. rr. 9, 10, 23, and 31 respectively, and discussed in this sub-section.

The application for leave.

Where the application for leave is necessary, it must be

(*t*) The suitor becomes entitled, as of right, to his execution forthwith. *Smith* v. *Smith*, L. R. 9 Ex. 121. The solicitor has no implied authority to enter into an agreement on his behalf to postpone it. *Lovegrove* v. *White*, L. R. 6 C. P. 440.

(*u*) A judgment in an action for a sum of money "to be dealt with as the Court shall direct," seems to mean that the plaintiff shall not enforce it without the direction of the Court. *Hodges* v. *Fincham*, 1 Ch. D. 9.

supported by affidavit. It is frequently, and specially in the first instance, an *ex parte* application; but where there is a person who has clearly a right to oppose, as, for example, the executor of a judgment debtor, the notice of motion or summons must be served on him.

Leave on conditional judgment or order.

When the judgment or order is conditional, thus falling within r. 9 above-mentioned (*x*), the application is in the first instance made *ex parte*, and then, if it appears to the Court to be necessary, other parties interested must have notice, and a notice of motion or summons must be served on them. The affidavit in support must show that all the conditions of the judgment or order have been fulfilled, and also that demand has been duly made as required by the rule (*y*).

Order giving leave need not be drawn up. O. LII. r. 14.

An order simply giving leave to issue a writ of execution (*z*) need not be drawn up; for by O. LII. r. 14, where an order has been made not embodying any special terms, nor including any special directions, but simply enlarging time for taking any proceeding, or doing any act, or giving leave (*inter alia*) for the issue of any writ (*z*), other than a writ of attachment, it shall not be necessary to draw up such order, unless the Court or a judge shall otherwise direct; but the production of a note or memorandum of such order, signed by a judge, registrar, master, chief clerk, or district registrar, shall be sufficient authority for such enlargement of time, issue, or other act; and a direction that the costs of such order shall be *costs in any cause or matter* is not to be deemed a special direction within the meaning of the rule. The solicitor of the person on whose application such order is made is to forthwith give notice in writing to such person (if any) as would, if this rule had

(*x*) See *Bell* v. *Denver*, 34 W. R. 368.

(*y*) For forms of demand, summons and notice of motion, see Appendix, *infra*, p. 393; Forms Nos. 1, 2.

(*z*) Strictly, it would appear, that an order giving leave to issue execution generally, and not merely a certain writ of execution, ought to be drawn up. *Vide infra*, p. 395, n. (*e*).

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not been made, have been required to be served with such order (*a*).

Leave to issue execution in certain cases.

Rule 23. "In the following cases, viz.:—

(a) Where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution (*b*);

(b) Where a husband is entitled or liable to execution upon a judgment or order for or against a wife;

(c) Where a party is entitled to execution upon a judgment of assets *in futuro;*

(d) Where a party is entitled to execution against any of the shareholders of a joint stock company upon a judgment recorded against a company, or against a public officer or other person representing such company,

the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly. And such Court or Judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or Judge may impose such terms as to costs or otherwise as shall be just."

The practice introduced by this rule is in lieu of that formerly pursued by means of a writ of *scire facias*. The application under the rule is made *ex parte* in most cases (*c*). The forms for proceeding will be found in the Appendix, *infra* (*d*).

Costs of order for change of parties.

As to sub-rule (a). The costs of an order under this rule for change of parties entitled to enforce a judgment, *e.g.*, executors of a deceased judgment creditor, must be

(*a*) As to form of order see note to form in Appendix, *infra*, p. 395.

(*b*) For example of exercise of power under this rule, see *Jones* v. *Jaggar*, W. N. 1886, 108.

(*c*) *Davis* v. *Andrews*, W. N. 1884, 94.

(*d*) Forms Nos. 3—7.

borne by the applicants (*e*). It has been decided that, for purposes of serving a bankruptcy notice under sub-s. 1 of s. 4 of the Bankruptcy Act, 1883, an executor who has not obtained an order under this sub-rule is in the position of a creditor whose execution has been stayed, and that therefore such notice is ineffectual (*f*). It is not necessary for a judgment creditor to obtain leave under this rule to enable him to proceed by way of garnishee summons (*g*).

Executor's position before order obtained.

Garnishee proceedings.

As to sub-rule (b). The liability of a husband on judgments against his wife, and the corresponding right of the judgment creditor to proceed against him, depend upon the date of the marriage. Where the marriage took place before the 1st January, 1883, and on or after the 30th July, 1874, the husband's liability upon any judgment which had been at the date of his marriage entered up against his wife was limited to the extent of certain assets particularized in the Married Women's Property Act, 1874 (*h*). After marriage he was liable, subject to the same limitation as to execution as we have just mentioned, to be himself sued *jointly with his wife* for her ante-nuptial contracts and torts. His common law liability for the post-nuptial contracts and torts of his wife was left untouched. In all cases, therefore, of actions brought after marriage this rule would not apply, for the judgment would be entered up against both him and his wife, and execution would follow the judgment (*hh*). A husband married since the 31st December, 1882 (*i*), is not liable on any judgment entered up, *by virtue of the Act of* 1882, against his wife, and this sub-rule has again no application; but he would appear to be liable to the extent of her property

Husband's liability on judgment against his wife.

(*e*) *Mercer* v. *Lawrence*, 26 W. R. 506.

(*f*) *Ex parte Woodall, Re Woodall*, 13 Q. B. D. 479.

(*g*) *Fellows* v. *Thornton*, 14 Q. B. D. 335.

(*h*) 37 & 38 Vict. c. 50, ss. 1, 2. Before the legislation which was begun by the Married Women's Property Act, 1870, where a man married a woman against whom judgment had been entered up, he was, of course, liable upon the judgment, it being enforced against him by *scire facias*. *Cooper* v. *Hunchin*, 4 East, 521; 2 Rop. Husb. & W. p. 75.

(*hh*) Judgment of Lord Esher, M. R., in *Scott* v. *Morley*, 20 Q. B. D. 120.

(*i*) The commencement of operation of Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, s. 25), is 1st January, 1883.

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coming into his hands upon a judgment entered up against her at the date of marriage; any other liability he may be under on account of the wife is a joint liability with her (*ii*). As to judgments against the wife, therefore, the rule, it is submitted, applies only when they are entered up against her prior to marriage, and then the husband's liability is limited, as we have mentioned. The husband's right to enforce a judgment entered up in favour of his wife remained as it was at common law till the commencement of the Act of 1882—*i. e.*, he could enforce a judgment entered in *her* favour (*k*). To such a case as this the sub-rule applies. The husband has no right to enforce a judgment entered up in favour of his wife, since the Act of 1882.

Husband's right to enforce judgment for wife.

Judgment of assets *in futuro*.

As to sub-rule (c). The judgment of assets *in futuro* is signed against the personal representative of the deceased debtor on a plea of *plene administravit* by him (*kk*). The form of the judgment is, in its most material parts, "It is adjudged that the plaintiff do recover against the defendant the sum of £ and £ for his costs of suit, to be levied of the goods and chattels which were of the said A. B. [the testator *or* intestate] at the time of his death, and which shall hereafter come to the hands of the defendant as executor [*or* administrator] to be administered" (*l*).

The effect of this judgment is, that the fact that there were no assets of the deceased in the hands of his representative at the time of judgment being signed is taken as admitted. The debt is also of necessity admitted. On applying, therefore, for leave to issue execution, the plaintiff must prove that assets have come into the hands of the representative to be administered after the date of the

Evidence in support of application for leave.

(*ii*) This seems to follow from M. W. P. Act, 1882, ss. 2 and 14, and judgment of Lord Esher, M. R., *Scott* v. *Morley*, 20 Q. B. D. 120, p. 125. As to execution against married women, *vide infra*, p. 375.

(*k*) Which could, from the same considerations as above mentioned, only happen when it had been obtained before her marriage.

(*kk*) See generally, Wms. on Executors, p. 1991. Enforceable by *scire facias* under s. 91 (17 & 18 Vict. c. 125), C. L. P. Act, 1854.

(*l*) For form, see 2 Saund. 216; Ch. Forms, p. 541.

judgment (*m*). And it is to this that the affidavit in support of the application must be directed. Evidence that, notwithstanding the judgment, there were assets will not do.

Execution against joint stock companies.

Sub-rule (d). In those cases where a company has no assets which can be reached by the ordinary writs of execution, but at the same time there is due to it from one or more of its shareholders an amount still unpaid on the share or shares he or they hold, a creditor of the company can proceed under this rule to obtain direct execution against the shareholder (*n*). The rule applies to all joint stock companies, whether incorporated by act of parliament or merely limited companies under the Companies Acts, 1862 to 1880; but it is clear that, in the latter case, the title of a liquidator, who had been appointed after the commencement of proceedings taken by a creditor of the company under this rule, would render such proceedings of no avail (*o*).

Scire facias against member of banking firm.

The remedy given by *scire facias* against shareholders in incorporated companies, was also given against members of banking companies (*p*). The judgment was obtained against the public officer of the banking company, and this method of realizing the sum due was provided where there were no partnership assets to meet it. Banking companies can, however, be wound up under the Companies Acts, and the remedy by *sci. fa.* has become practically obsolete. Whether process should be taken in this manner, or under rule 23, sub-rule (d), depends of course upon whether the banking company is or is not a joint stock company within its provisions (*q*).

O. XLII. r. 10.

Execution against a firm.

By rule 10,—"Where a judgment or order is against a firm, execution may issue:—

(a) Against any property of the partnership;

(*m*) *Wheatley* v. *Lane*, Saund. 216 a (2); Wms. on Executors, 1991 *et seq.*

(*n*) The whole practice is set forth in Ch. Arch. p. 1074.

(*o*) The remedy of *scire facias* was first given against shareholders in incorporated companies by the Companies Clauses Act, 1845 (8 Vict. c. 16, s. 36). And where the application is made with reference to a shareholder in such a company, it ought to be made in open Court under the section. See Ch. Arch. and last note; form of notice of motion, Appendix, *infra*, p. 395, Form No. 7.

(*p*) 7 Geo. iv. c. 46, s. 13.

(*q*) See Grant's Law of Banking, *passim*, and p. 381; Dan. Ch. Forms, p. 363, Nos. 907, 908, 909.

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(b) Against any person who has appeared in his own name under O. XII. r. 15, or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;

(c) Against any person who has been served as a partner with the writ of summons, and has failed to appear.

If the person who has obtained judgment, or an order, claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a Judge for leave so to do, and the Court or Judge may give such leave if the liability be not disputed, or, if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined."

Effect of judgment against a firm.

There is no rule or order prescribing how the judgment is to be entered where the writ has been issued against a firm; the judgment must, therefore, accord with the writ, and be in form also against the firm (*r*). Formerly, where it was essential for the names of the persons against whom judgment was signed to appear upon the record, in order to entitle the person pursuing the judgment to issue execution against them, no further process could be taken against a person who was subsequently discovered to have been equally liable as a member of the firm or partnership. This was because the cause of action against him was gone, and the debt merged in the judgment (*s*). The effect of a judgment against a firm is, therefore, clearly different from that of a judgment against such of the partners as were known to the plaintiff; and it is advisable in all cases to sue defendants, where practicable, and sign judgment against them, in their firm name (*t*). The above rule regu-

(*r*) *Jackson* v. *Litchfield*, 8 Q. B. D. 474. Except where appearance has been entered by one person trading as the firm, and the action has thenceforth been pursued against him only. See *Munster* v. *Cox*, 10 Ap. Ca. 680.

(*s*) *Kendall* v. *Hamilton*, 4 Ap. Ca. 504.

(*t*) This is submitted to be correct, notwithstanding the statement in a leading text-book, that "a judgment against a firm has the same effect that a judgment against all the partners had formerly." Poll. Part. 106.

lates the issue of execution upon such a judgment, and is said not to limit the judgment creditor's remedy to the particular course of procedure enacted by it (*u*).

The question who are the persons against whom a judgment against a firm is valid and unimpeachable has been the subject of much judicial discussion (*x*), and is still incompletely answered, if not altogether unanswered. The decision of Watkin Williams, J., that it is a question of fact, is unsatisfactory (*y*).

Leave to issue execution.

Where judgment is signed against a firm, it may be necessary, in the events mentioned in the rule, to obtain leave to issue execution (*z*). The formal proceedings on the application have already been referred to (*a*). The application is not *ex parte;* but a summons or notice of motion should be served on the person it is sought to make liable. The affidavit in support of the application must, of course, set forth the grounds upon which the alleged liability is based.

Evidence in support of application.

Service under rule 10 (c).

The service required by clause (c) of rule 10 is personal service. Mere service under O. IX. r. 6, is not sufficient for execution to issue without leave (*b*).

The five rules of O. XLII., 24, 1, 2, 9, and 10, we have just discussed, are not the only ones having reference to the judgment itself upon which execution may issue. The most important other rule, in this respect, is rule 5 of O. XLI., relating to judgments and orders, of which disobedience is a contempt. We shall consider this rule when we treat of the writ of attachment.

One other rule calls for notice in this sub-section.

O. XLII. r. 26.

Right to execution by persons other than parties.

By rule 26,—"Any person, not being a party to a cause or matter, who obtains any order, or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to such

(*u*) *Clark* v. *Cullen*, 9 Q. B. D. 355. It does not appear what form the suit in Chancery suggested in this case would have taken before the Judicature Act. A mere suit for discovery would have been useless after judgment signed.

(*x*) *Ex parte Young*, 19 Ch. D. 124.

(*y*) *Davis* v. *Morris*, 10 Q. B. D. 436.

(*z*) The effect of the execution when issued is referred to *infra*, p. 135.

(*a*) *Supra*, p. 22; Forms 2—7.

(*b*) *Ex parte Ide, Re Ide*, 17 Q. B. D. 755; 55 L. J. Q. B. 484; *Pollexfen* v. *Sibson*, 16 Q. B. D. 792.

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cause or matter; and any person, not being a party to a cause or matter, against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order as if he were a party to such cause or matter."

An example of the application of this rule would appear to be where a person has, at the instance of sequestrators or a receiver, been ordered to deliver up possession and has refused to do so. A writ of possession could then issue for non-compliance with the order, just as if the disobedient person had been a party to the proceedings.

Sub-sect. (iii).—*Rules relating to the actual issue of Writs of Execution.*

There are four rules of O. XLII. which concern the actual issuing of writs of execution.

Production of judgment to officer.

By rule 11,—"No writ of execution shall be issued without the production to the officer by whom the same should be issued of the judgment or order upon which the writ of execution is to issue, or an office copy thereof, showing the date of entry. And the officer shall be satisfied that the proper time has elapsed to entitle the creditor to execution."

Entry of judgments. O. XLI. r. 1.

Judgments are entered in pursuance of O. XLI. r. 1, by which,—"Every judgment shall be entered by the proper officer in the book to be kept for the purpose. The party entering the judgment shall deliver to the officer a copy of the whole of the pleadings in the cause, other than any petition or summons; such copy shall be in print, except such parts (if any) thereof as are by these Rules permitted to be written: provided that no copy need be delivered of any document, a copy of which has been delivered on entering any previous judgment in such cause." The prescribed forms to be used on entering judgment are contained in Appendix F. to the Rules.

Entry of orders made in chambers.

With regard to orders, as distinguished from judgments, we have Consolidated Order XXXV. r. 32, which applies

to practice in the Chancery Division. By that rule, all orders made in Chambers, and drawn up by the chief clerk or registrar, shall be entered in the same manner and in the same office as orders made in Court are entered.

The *præcipe* for writ of execution. O. XLII. r. 12.

By rule 12,—"No writ of execution shall be issued without the party issuing it, or his solicitor, filing a *præcipe* (*c*) for that purpose. The *præcipe* shall contain the title of the action, the reference to the record, the date of the judgment, and of the order, if any, directing the execution to be issued, the names of the parties against whom, or of the firm against whose goods, the execution is to be issued, and shall be signed by or on behalf of the solicitor of the party issuing it, or by the party issuing it if he do so in person. The forms in Appendix G. shall be used, with such variations as circumstances may require."

The forms in Appendix G., so far as they relate to writs of execution, will be found in the Appendix to this work.

The above rule replaces R. G. Hil. 1853, r. 71.

Indorsement on writ of execution.

Rule 13. "Every writ of execution shall be indorsed with the name and place of abode, or office of business, of the solicitor actually suing out the same; and when the solicitor actually suing out the writ shall sue out the same as agent for another solicitor, the name and place of abode of such other solicitor shall also be indorsed upon the writ; and in case no solicitor shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant

(*c*) The word *præcipe* has two distinct significations in English law. See Sweet's Law Dict. It is used in the sense of a formal direction to an officer of the Court, as here; and, also, there were several original writs at common law which came to be called *præcipes*. Co. Lit. 101 a. The word is manifestly taken from the initial words in the particular writs. It has always been part of the practice of our Courts to retain some record of what has been done, and to require that a *præcipe*, which is a mere direction by the attorney or person issuing the writ to the proper issuing officer to so issue it, should be given to him and filed. For the old practice as to original writs called *præcipes*, see Tidd Pr. 104 *et seq.*

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in person, as the case may be, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's or defendant's residence, if any such there be."

Date and form of writ of execution.

Rule 14. "Every writ of execution shall bear date of the day on which it is issued. The forms in Appendix H. shall be used, with such variations as circumstances may require."

This rule was first made by R. G. 1853, r. 72. Before that time writs of execution were tested or dated back to any day not preceding the first day of the term in which the judgment on which they were issued was signed (*d*).

The forms in Appendix H., so far as they concern us, will be found in the Appendix, *infra*.

O. XLII. r. 16. Indorsement on writ.

By Rule 16,—"Every writ of execution for the recovery of money shall be indorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable, and sought to be recovered under the judgment or order, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of 4*l.* per cent. per annum from the time when the judgment or order was entered or made; provided that in cases where there is an agreement between the parties that more than 4*l.* per cent. interest shall be secured by the judgment or order, then the indorsement may be accordingly to levy the amount of interest so agreed."

Indorsement as to interest.

Every judgment (*e*) when signed carries interest at 4*l.* per cent. per annum until satisfied, and execution for such interest may be levied (*f*). Where, however, judgment was signed for costs, a question has been raised as to the time from which the interest runs; and under the forms in use before October, 1883, the interest, both on judgment

Interest on costs.

(*d*) *Brocher* v. *Pond*, 2 Dowl. 472.

(*e*) By the terms of O. XLII. r. 24, this includes order, but does not include a County Court judgment. *Reg.* v. *County Court of Essex*, 18 Q. B. D. 704.

(*f*) 1 & 2 Vict. c. 110, s. 17. The judgment when signed merges an agreement to pay more. *Re European Central Rail. Co.*, 4 Ch. D. 33.

and costs, was held to be leviable in execution from the date of the certificate of taxation of the costs only (*g*). Now, however, judgment is signed for debt and costs, and interest runs from that time, unless an order is made to the contrary (*h*).

The five rules 11, 12, 13, 14, and 16, exhaust the express requirements of the Rules of the Supreme Court with regard to the issue and form of writs of execution. There are, however, other rules with respect to the same subject-matter which demand equal consideration.

Writs of execution, how issued.

The practice on the actual issue of a writ of execution is thus summarized in a leading work on procedure:—"The writ is issued by taking to the office at the Royal Courts the judgment or order, or an office copy of it, together with a præcipe duly filled up and signed, as required by Rule 12, O. XLII., and stamped with a 5*s.* impressed stamp, and a copy of the writ it is proposed to issue duly filled up.

"The copy writ is sealed and returned to the party issuing it out. It is not now the practice to file a copy" (*i*).

Issue of the writ from where the record was.

Before the Judicature Act, the writ of execution issued from the Court where the record was; for the record being the foundation of the writ, it was impossible that it should issue from any other place (*k*). This was of great importance when each of the Courts had its separate jurisdiction (*l*); but it is no longer of much practical consideration, for the records of all Divisions of the High Court are in the same place—the Central Office. At the same time, for

(*g*) *Schroeder* v. *Cleugh*, 46 L. J. C. P. 365. See *West* v. *West*, 17 L. R. Ir. 49.

(*h*) *Pyman* v. *Burt*, W. N. 1884, 100; *Landowners' West of England, &c. Co.* v. *Ashford*, 33 W. R. 41; *Re London Wharfage, &c. Co.*, 54 L. J. Ch. 1137.

(*i*) Arch. Pr. 795.

(*k*) 2 Wms. Saund. 5th ed. 38 (2).

(*l*) Good examples of the truth of this statement will be found in the two cases referred to in 2 Wms. Saund. 5th ed. 38 (2). In both cases execution was held to issue, not from the Court where the judgment had originally been obtained, but from the King's Bench, whither the record had been removed by writ of error. *Vicars* v. *Haydon*, Cowp. 843; *Cowperthwaite* v. *Owen*, 3 T. R. 657; Tidd Pr. 994 *et seq.*

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the reason that much of our present practice is founded on a recognition of the principles relating to the record, they demand some explanation.

The record.

Formerly, the term "the record" had, in common law process, a strictly technical sense. It was used to denote the parchment roll on which was entered the whole of the pleadings in the action, the verdict, and the judgment. The record was kept in the office established for the purpose in each of the courts (*m*). The record did not include orders on petitions or rules *nisi* and absolute (*n*). Writs of execution, strictly so called, could only issue if justified or authorized by the record.

Modern equivalent for the roll.

At the present time, there is no judgment roll or record in the sense in which the term was formerly used. Judgment is entered, as we have seen, in a book kept for the purpose by the proper officer, and at the same time a copy of the pleadings is delivered to him (*o*).

Further, writs of execution are now issuable, not only upon such judgments as are strictly of record, but also upon orders of the Court; for, as we have seen, by O. XLII. r. 24, it is provided that:—

O. XLII. r. 24. Orders enforced as judgments.

"Every order of the Court or a Judge in any cause or matter may be enforced against all persons bound thereby, in the same manner as a judgment to the same effect."

Writ must follow the record.

The writ of execution must follow or correspond with the record, now represented by the judgment or order upon which it is issued. A divergence had, formerly, disastrous, if not fatal, effects upon the execution attempted to be levied. In practice, the provisions of rules 11 and 12, above quoted, prevent almost entirely any material variance

(*m*) 3 Steph. Com. 7th ed. 566, and note (*d*). The older practice of entering judgment on the issue roll, thenceforward called the judgment roll, will be found in Tidd's Practice, p. 931, in detail. The necessity of entering judgment on the roll before issuing execution was abolished by C.L.P. Act, 1852, s. 206.

(*n*) A rule is not a record, but only a remembrance, not entered on the rolls of Court. Tidd Pr. p. 491.

(*o*) O. XLI. r. 1.

between the judgment or order and the writ. Under these rules the officer's duty is to inspect the proposed writ, and to compare it with the judgment which is produced to him (*p*). If the period from the entry of the judgment has not elapsed so as to entitle the creditor to execution, there is express power given to the officer to deal with the matter and refuse to issue the writ. There can be no doubt that, although, perhaps, the officer would not be liable for a breach of duty, in not preventing an abuse of the process of the Court, he has a supervising power to insist upon all due formalities being preserved.

In the face of these provisions, it is difficult to see how any material variance in practice could occur. At the same time, it is a possible contingency, and the most salient points should be kept in view. It is laid down in somewhat similar terms in books of practice, that the writ of execution must pursue the judgment as to parties, or show the reason why it does not (*q*)

Variation as to parties.

Another expression of the rule is, that no person can take the benefit of, or be affected by, a judgment until he is brought on to the record.

This is a most important rule, as its non-observance invalidates any execution. The most frequent cases which have occurred under the rule have been those where execution has been issued against one of several joint defendants against whom judgment has been signed; the execution ought in all such cases to be joint, notwithstanding the death of one of the plaintiffs, and although the levy might be several (*r*). This is, of course, subject to the particular

(*p*) At one time, errors resulted from the practice of not entering up the judgment before the execution issued, *e. g.*, where the practice was to enter an *incipitur* in the master's book, and issue execution thereupon. *Phillips* v. *Birch*, 4 Mann. & Gr. 403.

(*q*) Ch. Arch. 796; Dan. Ch. Pr. 828.

(*r*) See the cases mentioned in Rolle's Abr. 888; 2 Wms. Saund. 237; *Penoyer* v. *Brace*, 1 Ld. Raym. 244; *Clarke* v. *Clement*, 6 T. R. 525, p. 527; *Newton* v. *Rowe*, 8 Sc. N. R. 26.

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provisions of O. XLII. r. 10, as to enforcement of judgments against a firm (*s*).

Change of parties to be shown on writ.

In all cases where the parties to the judgment or order have been changed before execution issued, the writ should disclose how it is that the new parties have come upon the record. Strictly, this should be shown in the body of the writ, after the usual recital of the judgment, by another recital stating the order by which such change was brought about, where it is embodied in an order, and by an explanation of the circumstances where it is not. Care is necessary in filling up the *præcipe*, as well as the writ proposed to be issued.

Alleged exception to the rule.

There is said to be an exception to this rule where an action is, under statute, brought by or against an individual in the place of or representing a body of persons (*t*). So that, although judgment be signed by or against such person, execution can issue at the suit of the body of persons or against their property. The authority quoted for this alleged exception, however (*u*), is a case which has been strongly dissented from (*x*), and, besides, does not seem to support the proposition. The writ of execution there was issued against the representative individual, and was not challenged, so that it was presumably in proper form, and the Court did no more than to direct the sheriff not to levy upon his personal effects.

Misnomer in judgment.

In illustration of the rule that the writ must correspond with the record, it may be stated that the older authorities go to a great extent in technicality. For example, according to them, if there is a misnomer in the judgment it should be precisely followed in the execution (*y*); but there is probably no authority that so insignificant a variation as a correction of name would invalidate the writ.

(*s*) *Supra*, p. 27.

(*t*) Ch. Arch. 796.

(*u*) *Wormwell* v. *Hailstone*, 6 Bing. 668.

(*x*) *Cobbett* v. *Wheeler*, 3 El. & El. 358.

(*y*) *Fisher* v. *Magnay*, 6 Sc. N. S. 588. See *Reeves* v. *Slater*, 7 B. & C. 486.

Writ to conform with judgment as to amount.

Where the writ is for the recovery of money, it must be conformable with the judgment in respect to amount, that is to say, it should direct the levy of the whole sum due under the judgment or order (*z*); or where by any means, such as part payment, the amount recovered has been reduced, there should be a direction to the sheriff indorsed on the writ instructing him as to the sum which he has to levy. A mere error in this respect is not very material, for the person pursuing the execution can always amend his writ and indorsement (*a*). Any question as to the amount for which execution may be issued or levied can be settled on summons (*b*).

If by mistake execution is issued for too little, the person pursuing it may issue execution for the balance due after having obtained leave from the Court (*c*).

Irregular or improper execution.

If a writ of execution is issued when it ought not to be, or where it is irregular in a material particular, an application (*d*) can be made by summons or motion, stating the several objections intended to be insisted upon (*e*), to set aside the execution (*f*). The order will, so far as is prac-

(*z*) *Webber* v. *Hutchins*, 1 Dowl. N. S. 95; and *Cobbold* v. *Chilver*, 1 Dowl. N. S. 726. Both these decisions are good instances of the strictness of procedure, even at a late date. Now, probably, unless there was some ulterior injustice threatened, these cases would not be followed. *Sherwood* v. *Clark*, 15 M. & W. 764; *Arnell* v. *Weatherby*, 3 Dowl. 464.

(*a*) *M'Cormack* v. *Melton*, 1 A. & E. 331.

(*b*) Formerly on rule *nisi*. See *Evans* v. *Pugh*, 2 Dowl. 360. All persons interested, *e. g.*, other execution creditors, should be served with the summons. *Hammond* v. *Nairn*, 9 M. & W. 221; 1 Dowl. N. S. 351.

(*c*) *Hunt* v. *Passmore*, 2 Dowl. 414; *Re London Wharfage, etc. Co.*, 54 L. J. Ch., p. 1138.

(*d*) Formerly, such applications were made where the debtor had become bankrupt, and execution was nevertheless pursued against him (*Davis* v. *Shapley*, 1 B. & Ad. 54), and where questions arose between assignees in bankruptcy and the execution creditors. (*Backhouse* v. *Mellor*, 28 L. J. Ex. 141). Applications for such purposes as these would now be disposed of in the bankruptcy.

(*e*) O. LXX. r. 3. *Baillie* v. *Goodwin & Co.*, 33 Ch. D. 604. As to costs of non-compliance with this rule, see form of notice of motion in Appendix, Form No. 15.

(*f*) The old procedure by rule *nisi* has not, in this case, been ex-

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Execution issued in bad faith.

ticable, restore the parties to their position prior to the execution having been issued. The Court will set aside execution issued in bad faith; for example, in breach of an agreement not to do so (*g*).

Action for irregularity.

In all cases where the execution issued is wholly wrong, and not merely irregular, the person against whom it has been issued has a right to have it set aside, and the Court has no jurisdiction to prevent an action of trespass for the wrong (*h*); but where the proceedings are merely irregular, the Court has a discretionary power of imposing upon the applicant just and equitable terms as a condition of its interference, and will, therefore, not allow an action to be brought in respect of the informal execution (*i*).

Irregularity can be reached by amendment.

At the present time, however, the Court has large powers of amendment of all proceedings, including writs (*j*), and regards the substance, rather than the form, of the remedy granted. An application to discharge an execution for irregularity, where no actual injustice has been done, could seldom be made with effect.

Execution issued singly on joint judgment irregular.

Take, as an instance, judgment recovered jointly against A. and B., and consequent writ of *fi. fa.* directed to the sheriff, commanding, in the body thereof, to levy of the goods and chattels of A. This is an irregularity which, at one time, would probably have led to the discharge of the writ, as not agreeing with the record (*k*); but now-a-days the mere difference between this statement appearing on

pressly abrogated; but O. LXX. shows a summons to be the proper course. See Appendix, *infra*, Form No. 15.

(*g*) See *Pinches* v. *Harvey*, 1 Q. B. 868; 1 Ga. & Dav. 236; *Barlow* v. *Hall*, 1 Anstr. 461; *Parry* v. *The Great Ship Company*, 4 B. & S. 556; *Cash* v. *Wells*, 1 B. & Ad. 375. For a case where execution was issued in bad faith, and the solicitor issuing it was ordered to pay costs, see *In re Commonwealth Land, &c. Co., Ex parte Hollington*, 43 L. J. Ch. 99.

(*h*) *Rhodes* v. *Hull*, 26 L. J. Ex. 265; *Bartlett* v. *Stinton*, L. R. 1 C. P. 483.

(*i*) *Lorimer* v. *Lule*, 1 Chit. Rep. 134; and see generally, Ch. Arch. 14th ed. 831.

(*j*) See form of summons to amend, Appendix, Form No. 8.

(*k*) See authorities in note (*h*), *supra*, and *Newton* v. *Rowe*, 8 Sc. N. R. 26; *Phillips* v. *Birch*, 4 Man. & Gr. 403.

the face of the writ, or in a direction to the sheriff on the back of it, where such a direction is most usually placed, is not such an irregularity as would justify an application to the Court.

The effect of variation between the writ and the judgment upon the liability of persons doing acts under it, will be further discussed in the next Chapter; but as a general principle, the judgment being the conclusive fact against the creditor, the writ was only so far conclusive as it accorded therewith. The writ is not a justification, except perhaps to the sheriff, for acts done beyond those warranted by the judgment.

With these remarks as to compliance of the writ with the file or record, we close the discussion, in this place, of formalities relating to the mere issue of the writ.

Sub-sect. (iv).—*Stay of Execution.*

O. XLII. r. 17 (b). Stay of execution.

By sub-sect. (b) of rule 17,—"The Court or a Judge may, at or after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit."

The rule of which this is a sub-section applies in terms to writs of *fi. fa.* and *elegit* only, and the application under it must be made by motion to the Court before which the matter has been recently tried, or by motion or summons supported by affidavit (*l*). The Court has, however, always exercised a control over its own process, and sub-rule (b) may be said to be applicable to all executions on judgments and orders of all kinds. The Court, for example, always exercised a wide discretion in moulding the execution in *ejectio firmæ*, so as to confine it to such lands only as the plaintiff had legally recovered (*m*).

Stay on equitable grounds.

There are cases where a stay of execution can be obtained by applying for the exercise of the equitable

(*l*) *Vide infra*, Appendix, for form of summons, Form No. 9.

(*m*) *Vide infra*, Chap. on the Writ of Possession, p. 102 (*h*). *Doe* d. *Forster* v. *Wandlass*, 7 T. R. p. 118, *in notis*; *Roe* d. *Blair* v. *Street*, 2 Ad. & El. 329.

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jurisdiction of the Court. Where, for example, an action for administration has been commenced, a judgment creditor will be restrained from proceeding to execution, unless he has already issued the writ, and stands, therefore, in the position of a creditor who has obtained security (*n*).

Equitable mortgagee claiming a stay.

Again, where the property over which the legal execution has been attempted to be enforced is the subject of an equitable mortgage in a third person, he can intervene, and on motion or summons ask that execution be stayed. Before the Judicature Act, it would have been necessary, in such a case, for him to have taken separate proceedings by filing a bill in Chancery claiming an injunction. Now, however, there is no objection to his proceeding in the manner suggested, his application being in the nature of an application *pro interesse suo*, upon which an inquiry or issue can be directed. It depends entirely upon the nature of the equitable claim which the mortgagee alleges, whether he should proceed by separate action and appointment of a receiver, or in the summary method above suggested (*o*).

O. XLII. r. 27. *Audita querela* done away with.

By rule 27,—"No proceeding by *audita querela* shall hereafter be used, but any party against whom judgment has been given may apply to the Court or a Judge for a stay of execution, or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded, and the Court or Judge may give such relief and upon such terms as may be just."

The process known as *audita querela* was an action (called an equitable action) which lay for a person who was in execution, or in danger of being so, when he had matter to show that such execution should not have issued or should not issue against him (*p*).

(*n*) See *Ranken* v. *Harwood*, 10 Jur. 794.

(*o*) *Vide infra*, Chap. on Equitable Execution. The machinery for trying questions of priority, specially with respect to land, is much more perfect in the Chancery Division than in the Queen's Bench Division.

(*p*) Co. Litt. 290 b; notes to

The application for an order under this rule must be made on motion or summons, supported by affidavit. For form of summons, see Appendix (*q*).

Bankruptcy of judgment debtor.

The bankruptcy of the person against whom execution has been issued does not of itself stay proceedings thereunder. It will be seen in the course of this work in what stage of his process to execution the creditor becomes secured, and, therefore, when it is to his advantage to go on. The Court has, however, jurisdiction under sect. 10 of the Bankruptcy Act, 1883 (*r*), at any time after the presentation of a petition, to stay any execution or other proceeding, or allow it to continue on such terms as may be just.

There are, in like manner, provisions in the Companies Act, 1862, which provide, in effect, that no execution shall be issued or proceeded with, except by leave of the Court, against a company in liquidation (*s*). The occasions on which the Court will permit the execution to be proceeded with, and the conditions imposed upon the parties, are a matter of company law (*t*).

O. LVIII. r. 16. Stay of execution on appeal.

By rule 16 of O. LVIII.,—"An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any Judge thereof, or the Court of Appeal, may order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct."

O. LVIII. r. 17. Application, to what Court made.

By rule 17 of the same Order: "Wherever under these Rules an application may be made either to the Court below or to the Court of Appeal, or to a Judge of the Court below or of the Court of Appeal, it shall be made in the first instance to the Court or Judge below."

In no Court does an appeal of itself operate as a stay of

Turner v. *Davies*, 2 Wms. Saund. 439. For a better and fuller description, see the note to *Newton* v. *Rowe*, 7 Man. & Gr. p. 334.

(*q*) *Infra*, p. 397, Form No. 10.

(*r*) 46 & 47 Vict. c. 52.

(*s*) 25 & 26 Vict. c. 89, ss. 85, 87, 163. See Appendix, *infra*, Forms, Nos. 11, 12.

(*t*) See Lind. 1275; Buckley on Companies; Chadwick Healey's Comp. Law and Pr. p. 534.

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Construction of these two rules.

proceedings (*u*). The true construction of these two rules is, that there is an independent jurisdiction in the Court of Appeal to stay proceedings pending an appeal, but the Court is not to exercise that jurisdiction until an application to the same effect has been made to, and decided upon, by the Court below. The application to the Court of Appeal is not by way of appeal (*x*).

Where, however, an action for an injunction against parting with trust funds was dismissed, the Court of Appeal granted an injunction pending an appeal, the Court below having no jurisdiction so to do (*y*).

The application to stay.

The application for a stay, except when made, in the events mentioned, to the Court of Appeal, is made by way of summons before a master in the Queen's Bench Division (*z*); by motion on notice in the Chancery Division. It must be supported by affidavit, which must show special grounds for the application. Evidence that the respondent to the appeal will be unable to repay the sum payable to him under the judgment or order appealed from, forms a special ground; the order to stay is not obtainable as of right on bringing the amount in dispute into Court (*a*).

It is clear that no stay of execution will be granted to enable the unsuccessful party to decide whether he will appeal (*b*).

Terms of order on being granted.

Where special grounds are shown and the application granted, the terms of the order will be that the appellant

(*u*) Lord Esher in *Ex parte Registrar of Croydon County Court*, 17 Q. B. D. 389.

(*x*) *Cropper* v. *Smith*, 24 Ch. D. 305. See *Goddard* v. *Thompson*, 47 L. J. Q. B. 382. But where the appeal is an appeal to the House of Lords the application should always be made to the Court of Appeal. *Hamill* v. *Lilley*, 19 Q. B. D. 83.

(*y*) *Wilson* v. *Church*, 11 Ch. D. 576; *Otto* v. *Lindford*, 18 Ch. D. 394. And, pending appeal to the House of Lords, *Wilson* v. *Church* (No. 2), 12 Ch. D. 454; *Polini* v. *Gray* (2), 12 Ch. D. 439.

(*z*) *Oppert* v. *Beaumont*, 18 Q. B. D. 435. See *Republic of Peru* v. *Weguelin*, 24 W. R. 297. See form of notice of motion or summons, Appendix, Nos. 13, 14, *infra*, p. 399.

(*a*) *Barker* v. *Lavery*, 14 Q. B. D. 769; *The Annot Lyle*, 11 P. D. 114.

(*b*) *Webber* v. *L. B. & S. C. Rail. Co.*, 51 L. J. Q. B. 154.

pay the sum recovered to the respondent on his giving security to return it if unsuccessful on the appeal, or that the appellant pay the sum into Court, whichever the respondent prefers. The costs recovered must be paid to the solicitors, on an undertaking to return them if unsuccessful (*c*).

Costs of the application to stay.

The costs of the application to stay execution must be paid by the applicant. This is on the ground that he comes to the Court to ask a favour (*d*). But in a proper case, for example, where the respondent gets some advantage by the terms on which the order to stay is made, the costs will be made costs in the appeal (*e*).

O. LIX. r. 14. Stay of execution on appeal from inferior Court.

There is a special rule dealing with stay of execution on appeal from an inferior Court. By rule 14 of O. LIX.,— "The appeal shall not operate as a stay of proceedings under the decision appealed from, unless the inferior Court shall so order, or unless within ten days after the decision a deposit shall be made of, or security given to the satisfaction of such inferior Court for, a sum to be fixed by the said Court, not exceeding the amount of the money or the value of the property affected by the judgment, order, or finding appealed from."

Sub-sect. (v).—*Limitation of Time within which, after the Judgment or Order, Execution may Issue.*

O. XLII. r. 22. Execution may issue within six years.

Rule 22. "As between the original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment or the date of the order."

Issue of execution within a year and a day.

Before the passing of the C. L. P. Act, 1852, execution must have been issued within a year and a day. If it

(*c*) *Merry* v. *Nickalls*, 8 Ch. 205; *Morgan* v. *Elford*, 4 Ch. D. 388. For somewhat similar terms where payment out of Court had been ordered, see *Bradford* v. *Young*, 28 Ch. D. 18.

(*d*) *Merry* v. *Nickalls*, 8 Ch. 205.

(*e*) *Adair* v. *Young*, 11 Ch. D. 139; *Eames* v. *Hacon*, W. N. (1881), 4.

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were not so issued it was necessary to sue out a writ of *scire facias* to have the benefit of the judgment (*f*).

Irregular execution on judgment more than six years old.

By analogy to the older practice, it may be stated that if execution were to be issued on a judgment more than six years old, without any application or order under the next rule, such execution would not necessarily be a nullity, though it would be set aside as wholly irregular (*g*).

O. XLII. r. 23. Leave to issue after six years.

By O. XLII. r. 23 (a), where six years have elapsed since the judgment or date of the order, the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly (*h*).

It follows from the two last-mentioned rules, that execution may issue at any time within six years, but that after that time leave is necessary. The writ of execution may in all cases issue without notice to the execution debtor, notwithstanding the provisions of O. LXIV. r. 13; by which,—"In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but notice of trial, although countermanded, shall, be deemed a proceeding within this Rule."

O. LXIV. r. 13. One year's delay in proceeding.

The reason why this rule does not apply to writs of execution is stated to be that the word "proceeding" therein refers to a proceeding "towards and not after" judgment (*i*).

Ultimate limitation of execution on a judgment.

The limitation of time, within which judgment can be enforced by execution, is imposed by sect. 8 of the Real Property Limitation Act, 1874 (*k*), which enacts that no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judg-

(*f*) Co. Lit. 290 b; notes to *Underhill* v. *Devereux*, 2 Saund. 68. See note to sect. 128, Day's Common Law Procedure Acts, p. 148.

(*g*) *Blanchenay* v. *Burt*, 4 Q. B. 707; *Goodtitle* v. *Badtitle*, 9 Dowl. 1009.

(*h*) For form of notice of motion or summons, see Appendix, *infra*, Form No. 4.

(*i*) Snow and Winstanley's Annual Practice, 394.

(*k*) 37 & 38 Vict. c. 57.

ment, or lien, or otherwise charged upon, or payable out of, any land or rent at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, to the person entitled thereto, or his agent; and in such case no such action, or suit, or proceeding, shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given.

Leave to issue after payment on account, &c.

Payment on account, or payment of interest, or acknowledgment, prevents the operation of the twelve years' limit. The judgment creditor may, therefore, at any time, even after the expiration of twelve years from the date of the judgment or order, apply, on the ground that his judgment has been kept alive by such payment, interest, or acknowledgment, for leave to issue execution. In order to keep alive the judgment or order for more than twelve years where no payment or acknowledgment has been made, the judgment creditor should, before the expiration of that period, bring an action upon the judgment, not in the nature of an action of *scire facias*, but an ordinary action, in which, unless some intermediate defence has arisen, he will obtain judgment, to which the statute and rule 22 will again apply (*l*).

Practice.

The application for leave must be supported by affidavit, and the proceedings are the same as those to which we have already referred. A form of notice of motion or summons will be found in the Appendix (*m*).

Renewal of

By rule 20 of O. XLII.,—"A writ of execution (*n*), if

(*l*) See, for authorities on the section, Chit. Stat.; Darby & Bos. Statutes of Limitation, p. 117.

(*m*) *Infra*, Form No. 4, p. 394.

(*n*) Note that this only extends to what is included in the term by rule 8, *supra*, p. 20.

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unexecuted writ of execution.

unexecuted, shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided; but such writ may at any time before its expiration, by leave of the Court or a Judge, be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal of the Court bearing the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his solicitor, and bearing the like seal of the Court; and a writ of execution so renewed shall have effect and be entitled to priority according to the time of the original delivery thereof."

The application may be made in the first instance *ex parte*, and upon evidence showing the grounds thereof. Notice of renewal must be given to the sheriff (*o*).

Evidence of renewal.

By rule 21 of O. XLII.,—"The production of a writ of execution, or of the notice renewing the same, purporting to be marked with such seal, as in the last preceding rule mentioned, showing the same to have been renewed, shall be sufficient evidence of its having been so renewed."

Before the C. L. P. Act, 1852, ss. 124, 125, and the last-mentioned rules 20 and 21, replacing those sections, a writ of execution returnable immediately, once having been issued, could be executed at any time. There was, of course, no necessity for a *sc. fa.*

The effect of the writ continuing for one year only.

From the four rules of O. XLII., referred to in this sub-section, it appears that although execution may issue at any time within six years without leave, and after six years within certain limits with leave, a writ of execution once issued runs only for one year, and the further period secured by renewals. The advantage to be obtained by renewing a writ seems to be mainly a saving of expense. For although, apparently, an execution creditor could

(*o*) See Appendix, *infra*, Form No. 16.

within the six years issue without leave a new writ of execution after lapse of the old one, he would have to obtain the return of the latter before doing so.

Fourteen days' time before issuing execution, except for land or money.

By rule 19 of O. XLII.,—"A party who has obtained judgment or an order, not being a judgment for payment of money or costs, or for the recovery of land, may issue execution in fourteen days, unless the Court or a Judge shall order execution to issue at an earlier or later date, with or without terms."

This rule appears to extend to all kinds of execution on judgments for delivery of specific chattels. A writ of delivery is an example. Taking this rule in conjunction with rule 8, *supra*, and bearing in mind the difficulty of its construction, it would appear to preclude all process for contempt being issued until the expiration of the prescribed fourteen days, except where the contempt consists in non-payment of money or non-delivery of land (*p*).

SUB-SECT. (vi).—*Order of Issue of Writs of Execution.*

O. XLII. r. 29. Order in which writs are to issue.

By rule 29,—"Nothing in this Order shall affect the order in which writs of execution may be issued."

Meaning of this rule.

It is suggested that this rule requires judicial elucidation! There is no doubt that at law a judgment creditor could *issue* simultaneously all writs of execution to which the judgment entitled him (*q*). When, however, those writs were of different kinds, such as a *fi. fa.* and an *elegit*, and they came to be put into execution, he was bound to elect on which of those he had issued he would proceed. His rights, in case of there being a deficiency on the execution, were affected considerably, according to which of the two writs he had enforced. This matter will be considered in a subsequent chapter. The question arising for decision, where several writs of execution have

(*p*) Note, however, the terms of rule 28.

(*q*) *Foster* v. *Jackson*, Hob. 52; *Hodgkinson* v. *Whalley*, 2 Cr. & Jer. 86; *Lewis* v. *Morris*, 2 Cr. & M. 712. See also *Smith* v. *Johnson*, 2 C. M. & R. 350.

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been issued, has always been, whether the first writ had or had not been executed; the decisions are not on the right to issue the writs together (*r*).

Sect. 3.—Change of Parties by Devolution of Interest.

At common law.

At common law, by the death or the devolution of interest of any of the parties to an action, it abated, or ceased as a valid proceeding (*s*). Whether the party who died or whose interest devolved was plaintiff or defendant, the same consequence of abatement followed. If, before judgment, a plaintiff died, whatever his cause of action may have been, the action itself was at an end; if his executors had a right of action, they might begin *de novo*, but the original action was dead (*s*).

The limitation to the old rule.

This general rule was subject to limitations rather than exceptions in certain cases, where one of several plaintiffs or one of several defendants died pending the action. These cases, which are admirable illustrations of the stiffness of the old common law procedure, are commented on in the notes to *Underhill* v. *Devereux* (*t*). The decisions quoted in these notes are still useful, as the authorities on which all applications on change of parties by devolution of interest *pendente lite* are made under the now-existing practice.

It may be mentioned that, prior to the Jud. Acts, some cases, in which abatement of the action produced gross injustice, had been provided for by statute; for example, where the cause of action survived to the survivors of co-plaintiffs or against the survivors of co-defendants, the writ did not abate (*u*).

(*r*) *Edmond* v. *Ross*, 9 Price, 5; *Dicas* v. *Warne*, 10 Bing. 341; 2 Dowl. 762; 3 M. & Sc. 814. For true ground of decision, see *Andrews* v. *Saunderson*, 1 H. & N. 728.

(*s*) Notes to *Underhill* v. *Devereux*, 2 Saund. 72d; 2 Wms. Saund. 230.

(*t*) 2 Wms. Saund. 234.

(*u*) 8 & 9 Will. 3, c. 11, s. 7, re-enacted by C. L. P. Act, 1852,

As soon, however, as judgment had been given, the purpose of the action had been attained, and there was not, in case of death, the same reason for its abatement. We find, therefore, that at common law the judgment itself was unaffected by change of interest in the parties; but in order to perfect the record in a real action, a writ of *scire facias* might issue to enforce the judgment obtained, which writ was, by the statute West. II. (13 Edw. I.), c. 45, extended to judgments in personal actions (*x*). It was impossible to obtain execution on a judgment, whether signed before the death or devolution of interest or afterwards (*y*), without having recourse to a writ of *scire facias* (*z*).

No abatement after judgment.

Remedy by *scire facias*.

Suits in equity, like actions at law, abated, or as it was called, became defective, by the death or devolution of interest of the parties to them (*a*); but the remedy provided was more complete than at law, although there is no doubt it was much more dilatory and expensive. Where the interest or liability survived, effect was given to the prayer of the original bill, or to the decree which had been obtained, by new initiatory process, known as bills of revivor and supplement. A sufficient description of this old procedure is to be found in Daniell's Chancery Practice, where its cumbersome nature, even after the amendments introduced by the Chancery Procedure Act of 1852 (*b*), is abundantly shown (*c*).

In equity.

The effect of change of parties by death, &c., in all

s. 136. The death being "suggested" upon the record. Tidd's Practice, 1119; Day's C. L. P. Acts, p. 153.

(*x*) See notes to *Jeaffreson* v. *Morton*, 2 Wms. Saund. 12.

(*y*) Under 17 Car. 2, c. 8, *vide infra*, p. 51.

(*z*) *Penoyer* v. *Brace*, 1 Ld. Raym. 244; Comb. 441; *Earl* v. *Brown*, 1 Wils. 302; 2 Wms. Saund. 234, 248.

(*a*) For long note on change of parties generally, see Pemberton's Judgments and Orders, 91 *et seq.*

(*b*) 15 & 16 Vict. c. 89. See Pemberton on Revivor and Supplement.

(*c*) 1 Dan. Ch. Pr. 6th ed. 282, specially note (*y*). There were extensive powers of amendment of process in Chancery, but they did not apply to cases of the description now under discussion.

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O. XVII. r. 1. Change of parties by death, &c.

actions in the High Court, has been considerably modified, and forms the subject of O. XVII., by rule 1 of which it is provided that,—"A cause or matter shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*, and whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered notwithstanding the death."

In the subsequent rules of the Order, regulations are made whereby the person upon whom an interest in the subject-matter of the proceeding devolves, or against whom any right of action survives, can come in as or be made a party without the necessity of commencing a new action.

O. XVII. does not apply where the enforcement of a judgment already obtained is concerned, and only collaterally or incidentally in case of the enforcement of an order as distinguished from a judgment. Where the question is, who is entitled to enforce, or who is liable to have enforced against him, any judgment or order, the rule of Court applicable to the case, where there has been any change of parties, is rule 23 of O. XLII., to which we have already referred (*d*). Of course where under the judgment or order further proceedings must be taken before there is an end of the matter—a *finis litium*—and execution is also due against one or other of the parties, an order can be obtained attaining both ends at once (*e*).

Four periods when change of parties may occur in an action.

In the course of an action, there are four different periods in each of which a change or transmission of interest or liability may have a distinct and different effect.

(*d*) *Vide supra*, p. 24.

(*e*) See Appendix, *infra*, Form No. 6.

SUB-SECT. (i).—*Change of Parties taking place before Verdict.*

Before verdict.

The first part of the above rule 1, O. XVII., applies to this case; and there is, where the cause of action survives, no abatement.

Such persons as are entitled or liable can become or be made parties, and the procedure is regulated by O. XVII. (*f*).

SUB-SECT. (ii).—*Change of Parties taking place after Verdict, but before Judgment.*

After verdict, but before judgment.

This case is, again, in terms provided for by O. XVII. r. 1. In fact, for a considerable length of time, this particular case has been provided for by statute. It was early recognized as too flagrant an injustice to allow the fruits of a verdict to be abstracted from the estate of the successful party, merely by reason of his death, in such a case, before judgment signed (*g*).

SUB-SECT. (iii).—*Change of Parties taking place after Judgment signed and before Execution issued.*

After judgment, but before execution.

Formerly, the practice at common law in this case was, as has been stated, to issue a *scire facias* for the purpose of obtaining the benefit of the judgment (*h*). Putting out

(*f*) Prior to the Judicature Act, 1873, a creditor whose debtor died *pendente lite* might enter up judgment against him notwithstanding his death, and the judgment was by relation a judgment of the first day of the term in which it was signed. *Odes* v. *Woodward*, 2 Ld. Raym. 850; *Bragner* v. *Langmead*, 7 T. R. 20; 1 Wms. Saund. 255. This result was altered by the abolition of Terms, under sect. 26 of the Judicature Act, 1873. The effect of it, as regards execution, had been for some years and to a great extent done away with; because, under R. G. 1853, r. 72, every writ of execution bore date the day on which it was issued. See Wms. on Executors, pp. 1002, 2001.

(*g*) The old practice was to enter up judgment in the name of the deceased person, as if he had been living—under 17 Car. 2, c. 8. See Tidd, 1119, and *Weston* v. *James*, 1 Salk. 42. The practice was subsequently regulated by C. L. P. Act, 1852, s. 139.

(*h*) *Withers* v. *Harris*, 2 Ld. Raym. 806. The *scire facias* was essential

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of the question outlawry and attainder for high treason, there are three events (*i*) on which a change of interest necessitating a change of parties can take place—voluntary transfer of a party's interest in the judgment or order, involuntary transfer thereof under the Bankruptcy Act, 1883, and death. Again, that change of interest may take place, excepting as to voluntary transfer, with reference either to the person entitled to the benefit of the judgment or order, or to the person subject to it..

Transmission of plaintiff's interest.

On any devolution of interest of the person entitled to the benefit of the judgment, whether assignee, trustee in bankruptcy, or personal representative, he must, before proceeding, apply to the Court, under O. XLII. r. 23, for leave to issue execution.

The application may be made in the first instance *ex parte*. The affidavit in support should show distinctly the grounds upon which the application is made. The order obtained is in the action, and no addition or change of parties is, in cases of most executions, necessary (*k*). In cases, however, of writs of possession, *elegit*, and delivery, it is specially important to recite the transmission of interest, so as to show who are the parties obtaining the benefit of the execution. In many cases, and where the judgment or order which it is sought to enforce is interlocutory, it is advisable to apply at the same time for an order for change of parties, and to carry on proceedings under O. XVII. r. 4; the order should, of course, in-

to the validity of the execution. *Heapy* v. *Parris*, 6 T. R. 368. By the judgment the verdict became a debt of record. It was, therefore, immaterial of what nature the action had been. An executor could enter up judgment after verdict in an action of tort. *Palmer* v. *Cohen*, 2 B. & Ad. 966.

(*i*) Since the Married Women's Property Act, 1882.

(*k*) The record, as such, has lost much of its virtue. The file of proceedings takes its place, and now it is not even necessary to draw and file the usual order. *Vide supra*, p. 23. Before the Judicature Acts it appears always to have been the rule, that where one of several plaintiffs died after judgment, the survivors or survivor could proceed to execution without *scire facias*. 2 Wms. Saund. 230. See now, *Davis* v. *Andrews*, W. N. 1884, 94.

clude leave to issue execution. O. XVII. r. 4, is as follows:—"Where, by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceeding shall be carried on between the continuing parties and such new party or parties may be obtained *ex parte* on application to the Court or a Judge, upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence" (*l*).

O. XVII. r. 4. Power to add parties, &c.

The particular circumstances under which transferees of the plaintiff's right can proceed do not form a part of our subject, but of the special branch of the law concerned with each case. The right of an assignee depends upon the contract between him and the assignor, and is a part of the law of vendor and purchaser, or of conveyancing. The right of the trustee in bankruptcy is founded upon the Bankruptcy Act. The right of an executor, an administrator, or an heir, should be discussed under the law of wills, or the law of intestate succession.

In those cases where the order is obtained *ex parte*, and in effect sets right the applicant's record, he should bear the costs (*m*).

Costs of application.

With reference to the transmission of interest of the defendant, the first principle is, that the plaintiff cannot demand, nor can the defendant require him to accept performance by any other person (*n*). In the case of death of defendant, even a few hours before execution issued, the

Transmission of defendant's interest.

(*l*) See form of order in Appendix, Form No. 6, *infra*, p. 395.

(*m*) *Mercer* v. *Lawrence*, 26 W. R. 506.

(*n*) See same principle stated Poll. Cont. 208.

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execution will be invalid (*o*). In the case of the defendant's bankruptcy, proceedings to realize or enforce the judgment or order, so far as it is for the payment of money, against his property, are under special restrictions; so far as the judgment or order has a personal effect, it may or may not be affected by the Bankruptcy Act. These are particular cases which will be dealt with more conveniently under the heads of each form of execution. When the defendant dies still subject to the judgment or order, the extent to which his representatives and his estate are bound to fulfil the judgment or order, and when, therefore, leave to issue execution against them can be obtained, is matter for the special branch of law applicable to cases of the like character. In whichever way the change of interest of the defendant takes place, the application to which the plaintiff may have a right, is made in the same manner under O. XLII. r. 23 (*p*). On the devolution of liability of the person subject to the judgment or order the application for leave to issue execution, and where necessary for change of parties, is made on motion or summons, and not *ex parte* (*q*).

Change of parties after writ of execution issued.

Sub-sect. (iv).—*Change of Parties taking place after Execution issued, but before it is completed, or Return made.*

If the estate or interest in the judgment or order (or in the subject-matter thereof) of the party who has issued the execution is transmitted, the writ does not abate. It has been again and again laid down that a judicial writ does not abate, which means that it does not cease to run by reason of the death of the party issuing it (*r*). The writ

(*o*) *Chick* v. *Smith*, 8 Dowl. 337.

(*p*) *Supra*, p. 24.

(*q*) See form of order in Appendix, *infra*, Form No. 6.

(*r*) In a case on an extent, the writ being judicial, Croke held that it did not abate, whether the death of the plaintiff took place before or after the inquisition. "For the writ judicial to make execution shall not abate, nor is abateable, by the death of him that sues it." *Cleve* v. *Vere*, Cro. Car. p.

of execution is, however, a mandate to the sheriff or other officer; and although that mandate is not revoked by the death of the party issuing it, if the person dies against whom or against whose property it is directed before the sheriff has begun its execution, different considerations arise. The authorities on this point are somewhat conflicting. In an old case, where a writ of *fi. fa.* was in the sheriff's hands for execution, but before the goods of the defendant could be seized under it, the defendant died, the seizure subsequently made was held to be wrong (*s*). In another case, in which it does not appear whether seizure had been made, the reverse seems to have been held to be law (*t*). In a case in equity, on the express ground that a creditor in such a situation could not come in under a decree for the benefit of creditors, an injunction against the sheriff selling was refused in like circumstances (*u*). On the above cases it would appear that where the execution of the writ is actually begun, the person pursuing the execution is safe in proceeding, notwithstanding the death or devolution of interest of the party against whom the execution is issued (*v*). Where, however, the writ is in the

459. See *Harrison* v. *Bowden*, 1 Sid. 29; *Clerk* v. *Withers*, 2 Ld. Raym. 1073; 6 Mod. 299; *Wharam* v. *Broughton*, 1 Ves. sen. 180; *White* v. *Hayward*, 2 Ves. sen. 461. Other authorities, Ch. Arch. Pr. 14th ed. 811. The rule is thus expressed in a modern work of authority: "the efficacy of a writ in execution of a judgment does not cease with the death of the judgment creditor." Wms. Exors. 8th ed. 907, 2001. [See as to abatement of *scire facias*, also a judicial writ, *Woodyeer* v. *Gresham*, Skin. 682.]

(*s*) This appears to be the true construction to be placed on the first part of *Thoroughgood's case*, Noy, 73, although it does not actually appear whether the writ was issued at the time of the death. "I shall not determine how it would have been if execution had been in part executed." Powell, J., in *Clerk* v. *Withers*, 2 Ld. Raym. p. 1073.

(*t*) *Farrer* v. *Brooks*, 1 Mod. 188. Sect. 16 of Statute of Frauds seems to point to the delivery to the sheriff as being the crucial point in matter of time. *Eaton* v. *Southby*, Willes, 131. See also *Parkes* v. *Mosse*, Cro. Eliz. 181, directly opposed to *Thoroughgood's case* on any construction of it.

(*u*) *Ranken* v. *Harwood*, 10 Jur. 794.

(*v*) See, in the case of an *elegit*, *Re Hobson*, 33 Ch. D. 493, where

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sheriff's hands, and as yet wholly unexecuted, there appears to be no sufficient authority to warrant its execution being straightway proceeded with. Bearing in mind that O. XLII. r. 23 (*u*) provides only for leave to issue execution, and in the case supposed execution had already issued, the rule has in terms no application. The safe course would therefore, in such case, appear to be, to obtain an order under O. XVII. r. 4, as well as under O. XLII. r. 23, in the manner above referred to. This has the drawback that it necessitates the issue of a new writ of execution altogether.

Sect. 4.—Returns to Writs of Execution.

The direction to return the writ.

In all writs of execution addressed to the sheriff (*x*), there is a direction to the effect following: "And in what manner you shall have executed this our writ, make appear to us in our said Court immediately after the execution thereof. And have there then this writ." This part of the writ directs its return into the High Court. Formerly, the direction was to return the writ into the Court in which the record was (*y*).

Purpose of return.

The theoretical purpose for which this return of the writ is required is that the record may be completed, and what has been done under the judgment appear on the roll.

Former direction to return on day certain.

Formerly, writs of execution were made returnable on a certain day in term, by which time they were required to be in the proper office of the Court from which they had

the land had been delivered before the transmission of interest; but if the land had not been delivered, it is submitted that there must have been some suggestion of the defendant's death on the roll in order that the jury might duly find.

(*u*) *Vide supra*, p. 24.

(*x*) There is now no direction to return a writ of sequestration issued out of the Chancery Division, though there is such a direction in the writ of sequestration of ecclesiastical goods directed to the bishop.

(*y*) Dalt. 64.

issued, with the return or report of the sheriff (*z*); and if a writ was not made returnable on one of the appropriate days set apart for the return of writs, it was an invalid proceeding, and acts done under it unjustifiable (*a*). This state of the law was completely changed, and writs made returnable immediately, by 3 & 4 Will. IV. c. 67, s. 2.

The section has been repealed by 42 & 43 Vict. c. 59, Sch. pt. I., and there is now, in terms, no similar enactment.

Present direction is to return immediately.

The forms of writs in the Appendix to the rules of court have, however, been settled in accordance with the ample statutory powers to frame rules given by the Judicature Acts, and they are all made returnable immediately after execution. This renders a great number of decisions upon practice, which depended upon the return day being certain, obsolete. We do not, therefore, propose to discuss the effect of the direction to return on a day certain, or of its being in any other form in this respect than that prescribed in the rules.

"Immediately after the execution thereof."

The direction is to return "immediately after the execution thereof." These words have been the subject of judicial decision, and it appears clear, as a first principle, that a writ is not returnable till it has been fully executed. There is nothing, short of complete execution, to limit the force and duration of the writ (*b*). An order may be made by the Court at any time, at the instance of the person issuing the writ, that the sheriff return what he has done

(*z*) Tidd's Practice, 106.

(*a*) *Adams* v. *Sparry*, 1 Wils. 155; *Furtado* v. *Miller*, Barnes, 213. A writ returnable on a *dies non*, *e.g.*, Sunday, was invalid. *Morrison* v. *Manley*, 1 Dowl. N. S. 773. It is probable, if such an irregularity as the last named could under the new procedure happen at all, that it would be mere matter for amendment. *Williams* v. *De Boinville*, 17 Q. B. D. 180.

(*b*) *Jordan* v. *Binckes*, 13 Q. B. 757; 18 L. J. Q. B. 277; *Lewis* v. *Holmes*, 10 Q. B. 896. The question of what is complete execution in the case of an *elegit* will be discussed when we treat of that writ.

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under it, but this is only "in some sense," and not in truth, the return of the writ (*c*).

O. XLII. r. 20. Duration of writs of execution.

In connection with this point, however, rule 20 of O. XLII. is important; "a writ of execution, if unexecuted, shall remain in force for one year only from its issue." This, it is submitted, does not mean that if a writ is partly executed it still runs after the year, but the words "if unexecuted" import "if unexecuted in whole or in part."

The writ under this rule only justifies an execution put in force within the year, and on principle it appears that the sheriff's duty (at all events during that year) is to retain in his hands the writ sent him for execution until he has completely performed the mandate under it, notwithstanding that he may, under order, make to the Court one or more returns of what he has done. This practice has not, however, except in the case of execution of a *fi. fa.* or *sequest. de bonis ecclesiasticis* (*d*), been followed, for the sheriff returns the writ itself, although not completely executed.

Alias and *pluries* writs.

Thereupon a new writ, called an *alias*, followed on a second return by a *pluries*, issues, founded upon the return to the former writ (*e*). No leave for the issue of these *alias* and *pluries* writs is necessary. It is submitted that there is now no longer any real necessity for the continuance of this practice, which might well be altered. Everything requisite could be done under the original writ of execution if properly renewed (*f*). The practice of issuing

(*c*) *Kemp* v. *Hyslop*, 1 M. & W. 58, where it was put thus, that a judge had no power to order return before the execution completed. *Lewis* v. *Holmes*, 10 Q. B. 896. Perhaps it would be clearer to say that in such case there should be no return *of* the writ, but merely a return *to* it.

(*d*) *Vide infra*, Chap. VII.

(*e*) Forms in Appendix, *infra*, Nos. 17 and 18.

(*f*) In case of an omission to renew before the expiration of a writ, it would appear that a new writ may issue under O. XLII. r. 17. The return of the former writ should in such case be first obtained.

alias and *pluries* writs at the present day is evidently consequent upon the analogy afforded by the practice when writs were returnable on a day certain. There, after the return of the writ, it was at an end, and a new one was necessary.

Practice as to return.

The practice, on a return to a writ being made, has hitherto been to file the writ and return together, and this, no doubt, is in strict conformity with the old idea of the record (*g*). It is suggested that the return alone might now be filed, leaving the writ in the sheriff's hands for further execution (*h*).

Irregularity of writs of execution.

The validity of every writ of execution depends entirely upon the authority given by the record or file of proceedings, the writ itself not being part of the record till it is returned. If at any time the record was incomplete, in that it did not state what had happened with respect to the judgment, strictly speaking the writ was irregular, for, by reference to the record, it would appear unauthorized. This seems to be the true reason for those decisions, so frequent in practice in former times, of writs being set aside for the irregularity that the return to a former writ or its non-return did not justify the issue of such writs.

First writ to be returned before second issued.

Suppose, for example, that part of the sum due upon a judgment had been recovered under a writ of *fi. fa.*, it would be wholly irregular, until the first was returned, to have issued a second writ of execution, whether a *fi. fa.* or any other kind (*i*), the real reason for the irregularity of the second writ being that it was not in accordance with, or authorized by, the record. The cases in illus-

(*g*) There was, and is, therefore, this other reason for the *alias*, that the original remains no longer in the sheriff's hands. The *alias* might be issued at any time. *Harmer* v. *Johnson*, 14 M. & W. 336.

(*h*) See the procedure adopted with respect to writs of *fi. fa.* and *sequestr. fa. de bonis ecclesiasticis.* *Marsh* v. *Fawcett*, 2 H. Bl. 582; and *infra*, pp. 201, 207.

(*i*) "The Court will require a return to be made of what has been done under one writ, before it will allow its process to be a second time put in force." *Holmes* v. *Newlands*, 13 L. J. N. S. Q. B. 82.

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tration of this are very numerous in the older books of practice (*k*).

In more recent times, the necessity for care on this point has, to a great extent, been removed, by making all writs returnable immediately after execution, for the sheriff is thereby empowered to retain the writ in his hands, and levy again and again until the execution is complete. The abolition of imprisonment for debt, and consequent disuse of the *ca. sa.*, again removed this particular reason of irregularity further from the range of ordinary practice.

Description of returns.

"Returns are nothing else but the sheriffs' answers, touching that which they are commanded to do by the king's writ, and are but to ascertain the Court of the truth of the matter; and yet this is one of the most difficult

Their preparation.

things belonging to the office" (*l*). The difficulty is not so great now as formerly; for the essentials to a good return seem, in fact, to be few in number, if not trivial in character. It need not be in any particular form, so long as it is certain. If from the terms of it a clear answer to the mandate can be ascertained, it would appear to be

Requisites of a return.

sufficient. There are many general propositions laid down as to the requisites of a return, but they seem reducible to these two—that it should be certain, and should answer the

(*k*) Bac. Abr. tit. Execution, D. *Testatum fi. fa.* issued without former *testatum fi. fa.* having been returned. *Chapman* v. *Bowlby*, 1 Dowl. N. S. 83; *Coppendale* v. *Debonaire*, Barnes, 213. The plaintiff may issue several kinds of writ at the same time, but if he executes one he cannot afterwards execute the other without returning the first executed. *Miller* v. *Parnell*, 6 Taunt. 370; 2 Marsh. 78; *Knight* v. *Coleby*, 5 M. & W. 274. But where execution against two, put into effect (without result as to sum due) against one, execution can be issued against the other without leave. *Franklin* v. *Hodgkinson*, 3 D. & L. 554.

(*l*) Wats. Sher. 87. Returns are merely statements of fact, and their truth or falsehood has reference only to the time when they are made. *Smallcombe* v. *Olivier*, 13 M. & W. 77. The return is made on the back of the writ itself, or on a schedule annexed thereto. The forms of returns to the various writs will be found in the Appendix under their respective headings.

mandate contained in the writ. As to certainty, it is not required that the return shall be more than reasonably certain, *i. e.*, in time, place, and other material circumstances, for it is not a pleading (*m*). As to the answer to the writ, the return must allege what has been done, and must reply to every part of the mandate. So far as there is no answer, there is a non-return (*n*), and to that extent, if the attempted return is made under an order, the sheriff is in contempt. It has been decided that there is no answer where the return alleges something inconsistent with the record, if it falsifies the record, as it is termed (*o*). The old practice, when any such bad return had been made, was to move (by rule *nisi*) to quash it. If, on the argument of the rule, the return were found insufficient, the sheriff (having been previously ruled to make the return) was in contempt, notwithstanding the answer he had given. The practice at the present time, where there is any doubt of the validity of a return, is to issue a summons (*p*) to set it aside. If there is no doubt that the return is bad, it may, strictly speaking, be disregarded altogether, and proceedings taken as if it had not been made.

Falsifying the record.

The Court has always exercised a wide discretion in allowing the sheriff to amend his return on payment of the costs of the successful proceedings against him (*q*).

Amendment of the return.

The effect of particular returns will be discussed in treating of the writs to which they relate.

A return is not essential to the validity of an execution

Execution valid without return.

(*m*) *Reynolds* v. *Barford*, 2 D. & L. 327; Wats. Sher. 89, where many examples are given of bad, as distinguished from false, returns.

(*n*) *Rex* v. *Sheriff of Monmouth*, 1 Marsh. 344; *Eyres* v. *Taunton*, Cro. Car. 295; Wats. Sher. 90.

(*o*) *Moor* v. *Watts*, 2 Salk. 581; *Doyley* v. *White*, Cro. Jac. 323, a good example; *Grimshaw* v. *Emerson*, 1 Dowl. 337.

(*p*) The summons should be returnable before the judge, as, if the return is set aside, the sheriff would be in contempt, and his liberty affected. See O. LIV. r. 12.

(*q*) Wats. Sher. 92; *Cleaver* v. *Fisher*, 2 Dowl. N. S. 292. *In the Matter of Clarke*, 2 Q. B. 619.

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itself, except in the case of an *elegit* or other writ where an inquisition is a part of the procedure (*r*). In other cases, the execution by the sheriff remains valid or impeachable, quite apart from the fact of whether any return has been made. Subject to that exception, the return is only of use to any person in order that he may found some other proceedings, or take some further step. Hence it is never required to be made, unless for some such reason (*s*).

Practical utility of the return.

Where it is intended to proceed against the sheriff, as an officer of the Court, for a breach of duty in the execution or non-execution of the writ, a return is essential. It is, in such cases, the basis of the summary proceedings to which he is liable. But, on the other hand, where he has done an actionable wrong, the mere fact whether he has or has not made a return is immaterial, except so far as it is evidence against him of what has occurred. In summary proceedings, the return is conclusive against him, that is, he is estopped by it, but it is so only in that case. It has been said "a return is conclusive only in the particular cause in which it is made." Again, "the Court will so far give credit to it as to act on it in the case of an attachment; but on an indictment it would only be evidence" (*t*). In an action against him for a wrong, he can dispute the truth of his own return (*u*), it being stated to be *primâ facie* evidence against him (*x*).

(*r*) *Fulwood's case*, 4 Rep. 67 a. "All writs of execution which are to be executed by the sole authority of the sheriff . . . . are good when duly executed, though never returned by the sheriff,"—giving as the reason, "an execution executed is the end of the law." Bac. Abr. tit. Execution C. 1. But the sheriff must return an *elegit;* for this is not executed by his sole authority, but by an inquest taken by him.

(*s*) A return may be advisable when any dispute arises as to sheriff's charges or duties. See *Edmunds* v. *Watson*, 2 Marsh. 330; 7 Taunt. 5.

(*t*) *Jackson* v. *Hill*, 10 A. & E. 477; per Patteson, J., p. 492.

(*u*) *Brydges* v. *Walford*, 6 M. & S. 42; *Standish* v. *Ross*, 3 Exch. 527; *Jackson* v. *Hill*, 10 A. & E. 477; *Remmett* v. *Lawrence*, 15 Q. B. 1004; *Stimson* v. *Farnham*, L. R. 7 Q. B. 175.

(*x*) Com. Dig. tit. Retorn, G.; *Gyfford* v. *Woodgate*, 11 East, 297. It is of course always open to him to set his return right by amendment.

The return, although made by the sheriff, can be given in evidence against the parties to the action (*y*).

The duty of the sheriff is broadly enough stated: "Regularly the sheriff should make his return to every writ, but it is not usual for him to do so until ruled" (*z*).

Process to compel return.

The process to compel the sheriff to make his return to a writ was, formerly, by a side bar rule. At the present time the procedure is provided for by O. LII. r. 11:—"No order shall issue for the return of any writ, or to bring in the body of a person ordered to be attached or committed; but a notice from the person issuing the writ or obtaining the order for attachment or committal (if not represented by a solicitor), or by his solicitor, calling upon the sheriff to return such writ or to bring in the body within a given time, if not complied with, shall entitle such person to apply for an order for the committal of the sheriff" (*a*).

O. LII. r. 11.

Costs of application to compel return.

When it becomes necessary to make a peremptory order against the sheriff, that he do return the writ within so many days, it seems that he may be compelled to pay the costs (*b*).

Who entitled to the return.

All parties to the action are entitled to call on the sheriff to return the writ, although it is in reality in the discretion of the Court whether he will be ordered to do so (*c*). The order has been refused in many cases; *e.g.*, collusion between the solicitor and the sheriff's officer (*d*); or where an interpleader issue is pending (*e*), and other cases where in fact any default, negligence, or delay is attributable to the person applying for the order (*e*). The

(*y*) *Leonard* v. *Simpson*, 2 Bing. N. C. 176.

(*z*) Wats. Sher. 81; *Woodman* v. *Gist*, 8 C. & P. 213; Dalt. 64; Tidd. Pr. 1018.

(*a*) For form of notice, see Appendix, *infra*, Form No. 19, p. 401. On an application for order of committal, the usual formalities must be observed; *e. g.*, order to return must be served personally. *Re Heiron's Estate, Hall* v. *Ley*, 12 Ch. D. 795. See *infra*, Chapter on Committal.

(*b*) *Re Heiron's Estate, Hall* v. *Ley*, 12 Ch. D. 795, following *Evans* v. *Davies*, 7 Beav. 81.

(*c*) *Angell* v. *Baddeley*, 3 Ex. D. 49.

(*d*) *Ruston* v. *Hatfield*, 3 B. & Ald. 204.

(*e*) *Hepworth* v. *Sanderson*, 8 Bing. 19; 1 Moo. & Sc. 64; *Hart* v. *Weatherley*, 4 Dowl. 171.

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party issuing the writ can, at any time after the writ is in the sheriff's hands (*f*) (subject to the discretion of the Court above mentioned), compel him to return what has been done under it, whether it has been executed or not (*g*). The party against whom the writ is issued can require the return of the writ when its purpose has been effected, not before (*h*); perhaps it may be said that it is in the discretion of the Court whether the return will be ordered, or whether, when made, it will be interfered with (*i*). It is clear that, where it is to the interest of the party applying to have the record completed, a return will be ordered (*k*).

Practice where return required by the defendant.

The above rule (r. 11, O. LII.) does not in terms allow the notice calling on the sheriff to be given in the case where the party, against whom the writ has been issued, requires it to be returned. It is difficult to say in such a case what the correct practice is. Certainly, the old method of making an application for such a purpose by rule and not by summons is not expressly varied. The particular case is not provided for by the rules, and, therefore, O. LII. r. 1, does not appear to apply.

Sect. 5.—Discovery in aid of Execution.

O. XLII. r. 32.

By O. XLII. r. 32,—"When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the Court or a Judge for an order that the debtor liable under such judgment or order, or in the case of a corporation that any officer thereof, be orally examined as to whether any and what debts are owing to

(*f*) It being returnable immediately after execution.

(*g*) For authorities, see valuable note to Ch. Forms, p. 406.

(*h*) *Daniels* v. *Gompertz*, 3 Q. B. 322; 2 Gale & D. 751; *France* v. *Clarkson*, 2 Dowl. 532; *Richardson* v. *Trundle*, 29 L. J. C. P. 310; 8 C. B. N. S. 474.

(*i*) See *Willett* v. *Sparrow*, 2 Marsh. 293; *Williams* v. *Webb*, 2 Dowl. N. S. 904.

(*k*) *Edmunds* v. *Watson*, 2 Marsh. 330; 7 Taunt. 5; *Richardson* v. *Trundle*, 8 C. B. N. S. 474; *Williams* v. *Webb*, *ubi supra*.

the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order, before a Judge or an officer of the Court as the Court or a Judge shall appoint; and the Court or Judge may make an order for the attendance and examination of such debtor, or of any other person, and for the production of any books or documents."

The application for this order is made upon motion or summons, and should be made on an affidavit setting forth the steps which have been taken to enforce the judgment, and the result thereof; for the Court will not be likely to order the expense of examination to be incurred before the usual methods of execution are exhausted. It is not necessary that the affidavit should state the belief of the deponent that debts are in fact due to the debtor (*l*), though doubtless, where the information is at hand, it will be better to state it to the Court. The application for the order.

The notice of motion or summons may be served in the ordinary way; that is to say, personal service is not necessary (*m*). Personal service of the order itself appears to be necessary if it is intended to found thereon proceedings for attachment in case of disobedience (*n*). And, further, conduct-money must have been tendered to the debtor (*o*). Service.

The form of order, made on the application, does not itself fix the time and place at which the debtor is to attend, but leaves it to be subsequently fixed by the Court or judge (*p*), of which appointment notice is to be given to the debtor (*q*). It would seem that both the order and the notice of appointment should be personally served.

The debtor has no right to object to a stringent cross-examination under this rule, as it has been made for Nature of the examination permitted.

(*l*) *Patterson* v. *Doyle*, 4 L. R. Ir. 33.

(*m*) See *In re A Solicitor*, 14 Ch. D. 152.

(*n*) *Mason* v. *Muggeridge*, 18 C. B. 642; Ch. Forms, p. 456. The indorsement required by O. XLI. r. 5, should be made upon the order.

(*o*) *Protector Endowment Co.* v. *Whitlam*, 36 L. T. 467.

(*p*) See form of order, Appendix, *infra*, Form No. 20.

(*q*) Dan. Ch. Forms, p. 421.

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purposes of discovery (*r*). The Court, it is submitted, exercises a wide discretion in granting the order, and will take into consideration other circumstances than the mere likelihood of recovering the debt. For example, it will not make the order against a debtor who has already been ordered, on a judgment summons, to pay by instalments (*s*).

"Any other person."

As to the words "any other person," a garnishee debtor comes within them (*t*).

Discovery in aid of execution on order other than for money.

By O. XLII. r. 33,—"In case of any judgment or order, other than for the recovery or payment of money, if any difficulty shall arise in or about the execution or enforcement thereof, any party interested may apply to the Court or a Judge, and the Court or Judge may make such order thereon for the attendance and examination of any party, or otherwise, as may be just."

Costs.

By rule 34,—"The costs of any application under the last two preceding rules, or either of them, and of any proceedings arising from or incidental thereto, shall be in the discretion of the Court or a Judge, or in the discretion of such officer as in rule 32 mentioned, if the Court or a Judge shall so direct."

(*r*) *Republic of Costa Rica* v. *Strousberg*, 16 Ch. D. 8.

(*s*) *Hayter* v. *Beall*, 44 L. T. 131.

(*t*) *Cowan* v. *Carlill*, 33 W. R. 583; 52 L. T. 431.

CHAPTER II.

OFFICERS OF EXECUTION—THE SHERIFF.

The enforcement of writs is carried out by the sheriff. We are only concerned here to inquire into his numerous duties so far as they relate to that purpose. Such duties have always been in great part a matter of statute law, and the numerous enactments relating to the subject have now been consolidated in an Act passed in the last session (*a*). It has been thought advisable to refer to some of the most important sections of the Act, and to include the Act itself in an Appendix (*b*).

Appointment

The appointment of sheriffs is made by the sovereign, directly, on the nomination of the Lord Chancellor and other high dignitaries (*c*).

The duties of the sheriff are said to be of a four-fold nature (*d*). We have only to do with his so-called ministerial duties, which are thus referred to in Dalton (*e*):

"The office of a sheriff consisteth chiefly in the execution and serving (*f*) of proces of law, and to doe this he is the immediate officer of the King and all his Courts (*scz.*, to

(*a*) 50 & 51 Vict. c. 55.

(*b*) Appendix II. *infra*, p. 455.

(*c*) 50 & 51 Vict. c. 55, s. 6. The manner of their appointment by "pricking" is wide of our subject. See, as to the history thereof, Reeve's Hist. vol. i.; 2 Co. Lit. 2nd Inst. 559; Dalton's Office of the Sheriff, ed. 1623, p. 2; Wats. Office of the Sheriff, p. 9. It is curious that the mode of nomination, still preserved, is supposed to be, by virtue of a statute, now lost.

(*d*) Coke tells us, "though he be still called *viecomes*, yet all he doth and all his authority is immediately from and under the king, and not from and under the earl." Co. Lit. 168 a. His duties are, in the same place, stated to be three-fold, but a more exhaustive enumeration is to be found, Wats. Sher. Ch. I.

(*e*) Dalt. p. 41.

(*f*) This part of their duty is now obsolete.

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execute the writs of the common law). And hee is sworne that he shall truely doe this, and hee must doe this without any favour, dread, or corruption."

Sect. 1.—Nature of the Office of Sheriff—his Officers and Substitutes.

The sheriff an officer of the Court.

Notwithstanding that the sheriff is the king's officer, he is, in the matter of the execution of writs, an officer of the Court. He may, therefore, be compelled to answer for the due execution of his office and of the duties imposed upon him, by the summary jurisdiction of the Court over its officers. He is liable as such to penalties, and to be committed for contempt if he disobey its orders (*g*). All writs of execution are, in the first place, directed to him, except in cases where he is personally interested (*h*). A sheriff is appointed for each county, and writs direct him to put them in force only within the county of which he is the sheriff (*i*).

Sheriff, the only officer to whom writs can be addressed.

Theoretically, there would appear to be no limit to the power of the king or of his Courts to appoint officers to enforce process. But, whether this is so or not, it is now well settled that (except where the sheriff is himself a party to the proceedings) a writ of execution confers no authority if it purport to impose the duty of enforcing it upon any other person (*k*).

Transfer of process from one sheriff to his successor.

The office of sheriff is not a transferable nor a continuous office; the appointment is a personal appointment

(*g*) See Tidd's Pr. 478; 50 & 51 Vict. c. 55, s. 29.

(*h*) This statement must be taken with the limitation imposed by the law relating to ecclesiastical persons, and in ancient times to many others; for instance, to the prior of an abbey, or the lord of a manor. See Dalt. 43.

(*i*) He has no authority, or very limited authority, beyond his own county. Wats. Sher. 3.

(*k*) *Grant* v. *Bagge*, 3 East, 128; argument in *Wentworth* v. *Broadwater*, Skin. 413; *Bowring* v. *Pritchard*, 14 East, 289.

merely (*l*). When, therefore, process is placed in his hands for execution, he would at common law have been bound to the parties until he had sued out his "writ of discharge" to complete it, whether his term of office had expired before it could be completed or not (*m*). Statutable provisions, however, have been made for the transfer of all writs and other process "not wholly executed" by the old sheriff to the new one on his appointment (*n*). A list of such process is made out, and a duplicate signed by the new sheriff; this operates as a discharge from the further charge of the execution of the writs, process, and other matters therein contained, without any writ of discharge (*o*) or other writ whatsoever. The question arising upon this enactment has reference to the construction of the words "not wholly executed;" and for this purpose a writ of *fi. fa.*, which has been so far executed that at the time of the new sheriff's appointment the goods have been sold, is said to be wholly executed, so that the proceeds must be recovered from the old sheriff, and not the new (*p*).

Liability of sheriff's representatives.

The office of the sheriff being a personal one, his representatives are liable in certain cases for his default in executing writs. For example, where money has been levied before his death, and not paid over, his executors are liable therefor (*q*). They are not, of course, liable for tortious acts of the sheriff, except perhaps so far as such

(*l*) 50 & 51 Vict. c. 55, ss. 3, 5. See, for an illustration, *Lovick* v. *Crowder*, 8 B. & C. 132.

(*m*) "The same sheriff who begins an execution must end it." 2 Saund. 47 dd.

(*n*) 50 & 51 Vict. c. 55, s. 28, sub-s. (1), re-enacting 3 & 4 Will. 4, c. 99, s. 7.

(*o*) 50 & 51 Vict. c. 55, s. 28, sub-s. (2), re-enacting (in effect) 3 & 4 Will. 4, c. 99, s. 7. The writ of discharge was formerly sued out by the old sheriff after he had, by indenture, assigned over all prisoners and process to the new sheriff.

(*p*) *Harrison* v. *Paynter*, 6 M. & W. 387.

(*q*) *Packington* v. *Culliford*, 1 Roll. Abr. 921, tit. Executors, pl. H. 2; *Perkinson* v. *Gilford*, Cro. Car. 539; *S. C.*, W. Jones, 430; *Adair* v. *Shaw*, 1 Sch. & Lef. p. 265.

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acts may have led to the appropriation of property which can be traced after the death (*r*). An action of this kind would not be an action for damages (*s*).

The liability of a sheriff to return a writ is limited to six months after he ceases to hold office (*t*).

Sheriff's deputies.

Every sheriff is bound to appoint a deputy in London, who shall have an office within a mile from the Inner Temple Hall. This deputy is to receive writs, grant warrants thereon, make returns thereto, and to accept service of rules and orders (*u*) touching the execution of any process (*x*).

Where sheriff interested, direction to co-sheriff or to coroner.

Where the sheriff is a party to an action, process therein must not be directed to him, but either to his co-sheriff, where there are two (*y*), or to the coroner (*z*). A coroner to whom a writ is so directed becomes thereupon an officer of the Court, just as is the case with a sheriff, and if the orders of the Court are not obeyed, is punishable in a similar manner (*a*). Where both the sheriff and the coroner are parties, the officers to enforce the writ are elisors, or persons appointed by the Court for the particular purpose (*b*). The writs are directed to them, and they

Elisors.

(*r*) *Hambly* v. *Trott*, 1 Cowp. 375. It is a question how far the executors of a sheriff are liable to complete an execution which he has begun. See *Gloucestershire Banking Co.* v. *Edwards*, 20 Q. B. D. 107.

(*s*) Pollock on Torts, pp. 61, 62.

(*t*) 50 & 51 Vict. c. 55, s. 28, sub-s. 3, re-enacting in effect 20 Geo. 2, c. 37, s. 2.

(*u*) Service of the notice, now replacing the rule *nisi* (O. LII. r. 11), is sufficiently made upon the deputy. Service on the deputy is a delivery to the sheriff to be executed. *Woodland* v. *Fuller*, 11 A. & E. 859.

(*x*) 50 & 51 Vict. c. 55, s. 24, re-enacting 3 & 4 Will. 4, c. 42, s. 20; Reeve's Hist. vol. 2, p. 545; *Harrison* v. *Paynter*, 6 M. & W. p. 390.

(*y*) *Letsom* v. *Bickley*, 5 M. & S. 144.

(*z*) *Weston* v. *Coulson*, 1 W. Black. 506. It is not necessary that the writ should disclose the fact that the sheriff is a party. *Bastard* v. *Trutch*, 5 N. & M. 109.

(*a*) *Andrews* v. *Sharp*, 2 Wm. Bl. 911; *Reg.* v. *Sheriff of Glamorganshire*, 1 Dowl. N. S. 308.

(*b*) The appointment is made by the master on an *ex parte* applica-

become, in like manner as the sheriff and coroner, officers of the Court (*c*). The bailiffs employed by the coroner are his officers, and not the sheriff's (*d*).

Form of direction to sheriff.

It will be observed, on a reference to the forms of writs of execution given in Appendix I., that they are all addressed generally to the sheriff of the particular county, without inserting his name (*e*). In an old case, this was stated to be the reason why the sheriff might execute process by his deputy, the under-sheriff (*f*).

The under-sheriff.

Every sheriff must, within one month of the notification of his appointment in the London Gazette, appoint his under-sheriff (*g*), who is usually a recognized legal practitioner, and may hold the office continuously, notwithstanding the annual change of sheriffs. The sheriff, in making an under-sheriff, does implicitly give him power to execute the ordinary and ministerial offices of the sheriff himself that can be transferred by law; as serving of process and executions, making returns, and the like (*h*). But although, practically, the whole of his ministerial duties are thus handed over to his deputy, the sheriff is alone responsible to the parties for the due execution of them.

Relation between sheriff and under-sheriff.

The relation between the sheriff and the under-sheriff is to some extent regulated by statute. For instance, on the death of a sheriff during his shrievalty, the office of the under-sheriff continues, and he is bound to execute the same till another sheriff be appointed (*i*), and can meantime appoint a deputy (*j*).

tion. See for old practice by rule absolute, *Mayor of Norwich* v. *Gill*, 1 Dowl. 246; *Mayor of Kingston* v. *Bubb*, 1 Dowl. 151. See Form in Appendix, *infra*, No. 21.

(*c*) See last note.

(*d*) *Serjeant* v. *Cowan*, 1 Cr. & M. 491.

(*e*) The writ is always to be addressed to the sheriff, or to some person acting in the capacity of sheriff. *Edwards* v. *Robertson*, 5 M. & W. 520; 7 Dowl. 857.

(*f*) *Levett* v. *Farrar*, Cro. Eliz. 294. A writ is not a commission. *Ibid.*

(*g*) 50 & 51 Vict. c. 55, s. 23.

(*h*) *Norton* v. *Simmes*, Hob. 13; Wats. Sher. 36.

(*i*) 50 & 51 Vict. c. 55, s. 25, sub-s. (1), re-enacting in substance 3 Geo. 1, c. 15, s. 8.

(*j*) 50 & 51 Vict. c. 55, s. 25, sub-s. (2).

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Under-sheriff's bond.

The under-sheriff, in nearly all cases, executes a bond or other security to the sheriff for his indemnification; but the arrangements between these two officers have nothing to do with the parties to the execution. The under-sheriff on his appointment (*k*) becomes the deputy of the sheriff, and his official acts in the execution of process are the acts of the sheriff (*l*). The only limitation which appears to be recognized to the sheriff's responsibility for the under-sheriff's acts, is that those acts shall be performed officially. It was said, formerly, that "the under-sheriff is the general deputy of the high-sheriff for all purposes" (*m*), but this language is too general, and should be limited as we have mentioned (*n*). The cases on this point have arisen upon the question of admissibility of the under-sheriff's and his bailiff's statements as evidence against the sheriff; such statements are always received (*o*). It appears clear that, the delegation of office to the under-sheriff being permitted by law, there is no relation between them of principal and agent. The under-sheriff being in fact, during his office, a deputy, and not an agent, an inquiry into the scope of his authority would be immaterial.

In consequence of his position being that of deputy, no action lies against the under-sheriff for wrong done in the execution of process. Any such action must be brought against the sheriff himself (*p*).

Bailiffs.

For the actual enforcement of writs the under-sheriff employs bailiffs (*q*). A bailiff is bound, before he intermeddles with the execution of writs, to make a declaration

(*k*) The appointment being revocable at the will of the sheriff. Wats. Sher. 37.

(*l*) Vincr Abr. tit. Sheriff (M.), 1.

(*m*) *Drake* v. *Sikes*, 7 T. R. 113; *Yabsley* v. *Doble*, 1 Ld. Raym. 190.

(*n*) *Snowball* v. *Goodricke*, 4 B. & Ad. 541.

(*o*) *Scott* v. *Marshall*, 2 Cr. & J. 238; *Jacobs* v. *Humphrey*, 2 Cr. & M. 413; *North* v. *Miles*, 1 Camp. 389.

(*p*) *Cameron* v. *Reynolds*, Cowp. 406. But where the sheriff has died during office, and the under-sheriff is thus compelled to do his duty, if he (the under-sheriff) also dies his representatives will be liable for moneys in their hands, the proceeds of an execution. *Gloucestershire Banking Co.* v. *Edwards*, 20 Q. B. D. 107. See, now, 50 & 51 Vict. c. 55, s. 25.

(*q*) "Yet it appears by experience that the king's writs are served by bailiffs, persons of little or no value." *Semayne's case*, 5 Rep. p. 91.

according to a statutory form (*r*); he is not in a similar position to that of an under-sheriff, but, on the contrary, has no general authority to act for the sheriff, and the mere fact of a person being continually employed as bailiff makes no difference (*s*). The bailiff's authority is a warrant which is made out by the under-sheriff, or in his office, and directs the bailiff to levy or enforce the execution (*t*); and proof of such warrant, it is said, must be given in order to render the sheriff liable for the acts of the bailiff (*u*); this statement, however, needs some modification, for the authority of the bailiff can, in some cases, be proved without the actual production of the warrant (*x*). The statement of a bailiff, made in the course of the execution of a writ intrusted to him, is, as we have seen, evidence against the sheriff in respect to the facts which have taken place; but it seems doubtful, on principle, whether such statement, if made with respect to the bailiff's authority, could be so used (*y*). Apart from mere matter of proof of authority, the bailiff cannot execute a writ without a warrant being delivered to him (*z*). The delivery of the warrant to him, subsequently to execution, will not be sufficient proof of his authority from the sheriff (*a*).

The warrant.

Proof of warrant in proceedings against sheriff.

There is no doubt that the sheriff is responsible not only

(*r*) 50 & 51 Vict. c. 55, s. 26.

(*s*) *Drake* v. *Sikes*, 7 T. R. 113.

(*t*) The requisites of the warrant in matter of form, and its effect generally, are well discussed in an excellent note to Chitty's Forms, p. 405. The warrant must not be filled up after it has left the office of the under-sheriff. *Burslem* v. *Fern*, 2 Wils. 47; *Housin* v. *Barrow*, 6 T. R. 122, where Lord Kenyon related the curious case that the plaintiff, having inserted his own name in a warrant for the execution of a *ca. sa.*, attempted to arrest the defendant, who shot him dead. The arrest being illegal, it was held to be manslaughter only, and not murder. See 9 A. & E. p. 843; *Cooper's case*, Cro. Car. 544.

(*u*) Wats. Sher. 42.

(*x*) *Scott* v. *Marshall*, 2 Cr. & J. 238.

(*y*) Wats. Sher. 42.

(*z*) *Hall* v. *Roche*, 8 T. R. 187. It seems doubtful whether it is necessary for an ordinary sworn bailiff to show his warrant when it is demanded. *Hall* v. *Roche*, *supra*; Bac. Abr. tit. Sheriff (N.), 1.

(*a*) *Jacobs* v. *Humphrey*, 2 Cr. & M. 413; *North* v. *Miles*, 1 Camp. 389, and note.

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for the acts of his under-sheriff, but also of his officers, "acting by colour of his warrant," and it is of no avail to him to allege that the officer acted contrary to the warrant given him (*b*); nor, when he has done so, that the officer was not authorized by his warrant to receive the proceeds of the execution (*c*). If, however, the sheriff appoint the nominee of the plaintiff as the bailiff, he cannot be ordered to return the writ (*d*); for, if a return is made, the sheriff is liable therefor as if he had appointed his own bailiff (*e*). And where such a special bailiff is appointed, the sheriff is not liable to the execution creditor for any negligence in the execution itself (*f*). The special bailiff is the sheriff's bailiff, and must account to him for the proceeds of the execution, and cannot, therefore, obtain priority for his nominor (*g*).

Sheriff not liable for plaintiff's nominee as bailiff.

Contempt by interference.

The sheriff being an officer of the Court, it will protect him in the performance of his duties. All persons interfering with his bailiffs in the execution of process, so as to render the same impossible or difficult, are guilty of a contempt of court (*h*). For example, interference with the sheriff's officer seizing, or who has seized, goods under a *fi. fa.*, so as to render execution impossible or dangerous, is a contempt (*i*). Again, the rescue of a person from the

Rescue, a contempt.

(*b*) *Sanderson* v. *Baker*, 2 Wm. Bl. 832; *Woodgate* v. *Knatchbull*, 2 T. R. 148; *Gregory* v. *Cotterell*, 5 El. & Bl. 571. And see *Aekworth* v. *Kempe*, 1 Doug. 40, where the same point of whether the sheriff was liable in trespass was raised, and it was ruled that he was. Lord Mansfield somewhat naively remarking, "In short, the point seems to us extremely clear, and it was not fair to puzzle us so long with it."

(*c*) *Woodman* v. *Gist*, 8 C. & P. 213.

(*d*) *De Moranda* v. *Dunkin*, 4 T. R. 119.

(*e*) *Beckford* v. *Welby*, 2 Esp. 591; *Harding* v. *Holder*, 9 Dowl. 659; 3 Sc. N. R. 293.

(*f*) *Doe* v. *Trye*, 5 Bing. N. C. 573; 7 Dowl. 636; *Ford* v. *Leche*, 6 A. & E. 699; 1 N. & P. 737. As to what is sufficient to constituto a special bailiff, see *Corbet* v. *Brown*, 6 Dowl. 794; *Seal* v. *Hudson*, 4 D. & L. 760; 11 Jur. 610.

(*g*) *Sawle* v. *Paynter*, 1 Dowl. & Ry. 307.

(*h*) It must be remembered that the authority of every officer of the Court is dependent upon the validity of the proceedings. *Ex parte Page*, 17 Ves. 59; *Cooper* v. *Asprey*, 3 B. & S. 932.

(*i*) *Cooper* v. *Asprey*, 3 B. & S.

custody of the sheriff has always been a contempt (*k*). With reference to this particular case of rescue, it may be remarked, that the sheriff's return to that effect was equivalent, for some purposes, to a conviction (*l*). Process of contempt would, on the return being made, be issued immediately. Further, the party aggrieved by the rescue could proceed, criminally, by indictment (*m*), or, civilly, by action on the case. The plaintiff was said, therefore, to have a triple remedy (*n*). These three remedies are still open.

It is, however, at the present time, almost obsolete to consider the effect of the sheriff's return of rescue, for the reason that such a return is not good, except to a writ of mesne process. The sheriff, being bound by statute (*o*) to raise the *posse comitatus*, and go in proper person to effect the execution, cannot get behind the enactment and shelter himself by a return of rescue (*p*).

Action by sheriff—trespass to goods.

Besides process for contempt, the sheriff can maintain an action for interference with the execution; at any rate, he could do so for rescue, where that return was legal, and can still for taking goods which he has seized out of his possession (*q*).

Franchises or liberties.

There still exist in different parts of England what are known as franchises or liberties. A franchise is a royal privilege, or branch of the sovereign's prerogative, subsisting in the hands of a subject (*r*). The particular franchise with which we are slightly concerned is that of *retorna*

932; 32 L. J. Q. B. 209. For process in contempt, see Book II. *infra*.

(*k*) Tidd's Pr. 236; Wats. Sher. 98; *Brasyer* v. *Maclean*, L. R. 6 P. C. 398, and authorities quoted in argument.

(*l*) Wats. Sher. 98; Tidd's Pr. 236; *Rex* v. *Pember*, Lee Ca. temp. Hard. 112; *Brasyer* v. *Maclean*, L. R. 6 P. C. 398.

(*m*) Russell on Crimes, Chap. Of Rescue.

(*n*) Tidd's Pr. 236.

(*o*) 50 & 51 Vict. c. 55, s. 8.

(*p*) Wats. Sher. p. 97, where the real distinction between arrest on mesne and final process is disclosed.

(*q*) Wats. Sher. 272; *Wilbraham* v. *Snow*, 2 Saund. 47 *a*; *Tyrrel* v. *Bath*, Vin. Abr. tit. Sheriff (Y.); *Sawle* v. *Paynter*, 1 Dowl. & Ry. 307.

(*r*) 2 Bl. Comm. ed. 1876, p. 31.

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brevium, importing that the owner of the franchise, or his bailiff, has the return and execution of all writs within his liberty. Writs for execution within the liberty are not directed to the bailiff, but to the sheriff; in fact, a writ directed to the former is bad, and acts done under it illegal (*s*). The sheriff, having received a writ for enforcement, sends his mandate to the bailiff of the liberty, who then puts the writ into execution (*t*). The sheriff's return that he has made such a mandate (*mandavi ballivo*) is a good return (*u*). The execution of writs in liberties and franchises is regulated by statute. Section 34 of the Sheriffs Act, 1887, applies its provisions to the bailiffs of liberties, subjecting them to certain conditions of office, for the particulars of which reference must be made to the terms of the statute (*x*).

Return of *mandavi ballivo*.

Execution by sheriff notwithstanding liberty.

When the sheriff returns *mandavi ballivo*, but there is no return to the writ by the bailiff, the sheriff may be ordered to execute the writ by his own officers (*y*). The order of the Court here referred to is not essential to the validity of the execution; for, notwithstanding the franchise, the sheriff *may* still, without any order, enforce the execution by his own officers, and it will be good. In such a case, the sheriff can be called upon to answer to the owner of the franchise whose rights have been infringed, but the rights of the parties under the writ are not affected (*z*). The provision that the sheriff may be ordered by the Court to execute the writ, is carried out after the order is obtained by issuing a new writ, in which is inserted the clause of *non omittas propter aliquam libertatem* (*a*).

Non omittas.

(*s*) *Bowring* v. *Pritchard*, 14 East, 289; 1 Ch. Rep. 375, n.; *Grant* v. *Bagge*, 3 East, 128.

(*t*) Form of Mandate, see Appendix, *infra*, No. 22.

(*u*) Form of this return, Appendix, *infra*, No. 23. But the sheriff must not return that he has delivered it to a bailiff of some liberty, not heretofore recorded in the Exchequer. 50 & 51 Vict. c. 55, s. 10, sub-s. (2).

(*x*) Appendix. II. *infra*.

(*y*) 50 & 51 Vict. c. 55, s. 34, sub-s. (f). See Appendix II. *infra*.

(*z*) *Sparks* v. *Spink*, 7 Taunt. 311; *Fitzpatrick* v. *Kelly*, cited 3 T. R. 740.

(*a*) A form of this clause is in the Appendix, *infra*, Form No. 24.

A most full and able account of the law relating to bailiffs of franchises is to be found in Chapter IV. of Watson's Office of the Sheriff.

Having thus ascertained the subordinate officers of the sheriff, and the position in which they stand with reference to him, it will be well to state shortly the practice as to the delivery of writs for execution.

Delivery of writs to be executed.

The writs are not, of course, delivered to the sheriff himself, but to his deputy, whether such deputy is an under-sheriff or a deputy appointed in London (*b*). A receipt for the writ must, if demanded, be given to the person delivering it (*c*). Where a writ is issued in London for execution by the sheriff of a particular county, it is delivered to the sheriff's deputy in London, who thereupon directs his warrant to the sheriff's officer nearest to the place where the writ is to be executed, or forwards the writ to the under-sheriff of the county who makes out the warrant (*d*).

A sheriff's officer is under no duty to receive the writ from the party, but should take it from the deputy or the under-sheriff, together with his warrant to execute it (*e*).

Issue of writ from district registry.

Where the writ is issued in a district registry, it is forwarded to the under-sheriff of the county in which it is to be issued, who thereupon makes his warrant in the usual way.

Sect. 2.—Liability of Sheriff and Officers of Execution.

We have seen that for the acts of the under-sheriff, and of the officers of execution, the sheriff is responsible to the parties to the proceedings. In case of any wrong being

(*b*) As required by 50 & 51 Vict. c. 55, s. 24.

(*c*) 50 & 51 Vict. c. 55, s. 10, sub-s. (1).

(*d*) This latter appears to be the usual practice; see course pursued in *Sawle* v. *Paynter*, 1 Dowl. & Ry. 307.

(*e*) *Triminger* v. *Keene*, W. N. (1882), 106.

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committed, in the course of the execution, to third persons, he is also responsible to them. We proceed now to discuss the extent of his duty and responsibility. It is clear that the only justification for any act done is the writ which is directed to him, and, if challenged, the legality of the act must depend upon the authority given by the writ (*f*). The relief afforded to sheriffs by the Interpleader Acts and rules of court is so extensive, that it is but seldom that any question of the sheriff's responsibility can arise; where it does, however, it is of two kinds:—

Nature of sheriff's responsibility.

(i.) For the due performance of the mandate contained in the writ;

(ii.) For acts done which are not within the mandate or commanded by the writ.

SUB-SECT. (i).—*Sheriff's Liability for the due Performance of the Mandate contained in the Writ.*

General duty to perform what is commanded.

"In the execution of all writs and process of law the sheriff and his officers must therein do all that which they shall be commanded to do by the writ, and they must pursue the effect thereof in every behalf; and they may proceed no further or otherwise in the execution thereof than they are authorized by the writ" (*g*).

The person most interested in the due fulfilment of the execution is the person pursuing it. We have already seen that where there is neglect or delay in executing the process issued to the sheriff, the Court will summarily compel him to perform his duty, under the ultimate sanction of being attached and committed to prison. The first step against a sheriff who is not doing his duty is to obtain the return of the writ. We have seen that the procedure for this purpose, though formerly by rule *nisi* against the sheriff, is now, in the first instance, by simple notice under O. LII. r. 11 (*h*).

(*f*) For a plea of justification, Bull. & Le. Pleading, 772, where, also, authorities are set forth.

(*g*) Dalt. 64.

(*h*) P. 63, *supra;* Impey on Sheriffs, p. 91.

No action for non-return.

If the sheriff, after such notice, refuses or neglects to make a return, or if the return, when made, shows that the mandate has not been obeyed, he will be forced to do his duty by process for contempt. For the reason that this procedure is provided, no action will lie against him for the mere non-return of the writ into Court. The breach of his duty in this respect is not an actionable wrong (*i*).

Sheriff's liability to person issuing execution.

The true basis of liability in the sheriff to the person setting him in motion is, it is submitted, somewhat unsatisfactorily dealt with in many decisions upon the subject. The one duty of returning the writ, which is part of the mandate contained in it, is not, as we have just remarked, the basis of any action for negligence or breach of duty. When, however, we come to the actual execution itself, we find that neglect or refusal to execute the writ, as distinguished from returning it, is an actionable wrong (*k*). This action is said to be founded on a right to sue a public officer for neglect of his duty (*l*). It would, it is submitted, have been clearer and more comprehensible to base the reason of his liability on other grounds. The mandate to the sheriff is a writ directed to him in the name of the sovereign; it is issued and placed in the sheriff's hands at the instance of the litigant, who is a private

(*i*) In the case provided for by the Statute of Westminster II. (13 Ed. 1, c. 39), only recently repealed (50 & 51 Vict. c. 55), there was an action against a sheriff who did not return the writ. But delivery of the writ to the sheriff in the County Court, after the ordinary business of that Court was done, was a condition precedent to bringing the action. The statute provided that the person delivering the writ to the sheriff could demand a bill or receipt for it (compare 50 & 51 Vict. c. 55, s. 10, sub-s. (1)). The whole proceedings have long been obsolete. *Vide* Coke, 2nd Inst. 449, 452; Wats. Sher. 118; 2 Reeves' Hist. 92; note to *Moreland* v. *Leigh*, 1 Stark. 388.

(*k*) Action for not levying, *Dennis* v. *Whetham*, L. R. 9 Q. B. 345. The liability of the sheriff for negligence in the execution of the writ, and his freedom from liability for acts *ultra* the writ, committed by his bailiff, is remarked upon, *Lane* v. *Cotton*, 12 Mod. p. 488.

(*l*) Bac. Abr. tit. Sheriff (M), 1.

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person, and who has complete control over the execution. For the purposes, therefore, of the execution of the writ, the sheriff becomes the mandatory of the person issuing it. If he refuses to execute the mandate, no action should lie against him therefor, but recourse should be had to the tribunal whereof he is an officer. But if the sheriff executes, or attempts to execute, the mandate of the writ, he should be, as he is now, liable in an action to the person who sets him in motion for any negligence in the performance of his duty. Thus, his position, with regard to actions which it is possible to bring against him, is precisely analogous to that of any other mandatory who is liable to the person for whom he undertakes a duty, whether he could be compelled to undertake that duty or not (*m*).

Actions against sheriff;—

for not putting writ into execution;—

for negligence in executing.

This view of the law has not, however, been entirely that adopted by the Courts. It is established that an action will lie for neglecting to put a writ in execution when opportunity arises (*n*), as well as for negligence in the execution when undertaken (*o*). The actions are put on the ground that the sheriff has committed a breach of duty as an officer of the Court (*p*), notwithstanding that there should exist, and does exist, against him, the summary process which the Court applies to all its officers.

No damage, no action.

Just as in the case of any other mandatory, or of the analogous voluntary bailee, the sheriff is not liable in an action where no damage has resulted from his negligence (*q*). The same rule applies where a false return

(*m*) An analogous principle is that underlying the liability of a voluntary bailee. *Coggs* v. *Bernard*, 2 Ld. Raym. 909. It is submitted that the kind of negligence, in the execution of a writ, for which the sheriff can be made liable, should be limited by the same considerations as in the case of the voluntary bailee whose liability was under discussion in that leading case.

(*n*) *Keightley* v. *Birch*, 3 Camp. 521.

(*o*) *Brown* v. *Jarvis*, 1 M. & W. 704; *Randell* v. *Wheble*, 10 A. & E. 719.

(*p*) See, in addition to cases referred to in last note, *Hobson* v. *Thelluson*, L. R. 2 Q. B. 642.

(*q*) Cases in preceding two notes. There is said to be an exception in the case of negligence in arrest on

has been made; damage must be shown (*r*). In strict accordance with principle, the return of the writ by the sheriff, which, as an officer of the Court, he is bound and can be compelled to make, has nothing to do with an action for negligence, either in not executing a writ or in its execution. The action requires no such foundation.

Return not necessary to found action.

If the sheriff has executed the writ, and has in his hands or possession the proceeds of the execution, he can be at once sued to deliver them up to the person entitled to them, the return, again, not being necessary to found the action (*s*). It is, of course, valuable evidence, and should be obtained by the plaintiff in such an action, because of the *prima facie* case it raises against the sheriff (*t*). Besides his remedy by action, the person moving the sheriff can put in force against him the summary jurisdiction of the Court in all cases where a return has been made showing the sheriff to have the proceeds of the execution in his hands, and in such cases this is the most expeditious and convenient method of proceeding (*u*).

Proceeds in sheriff's hands.

Summary process where proceeds in sheriff's hands.

The sheriff is the mandatory of the person issuing the writ, to the extent that he must obey the instructions given to him, or be liable for the consequences. When he ceases to act as mandatory, the writ is no justification to him (*x*). Care must be taken to distinguish between a mere mandatory and an agent, of which distinction the importance will shortly be discussed.

ca. sa. on *final process*, where the action was held to lie, although no damages were proved. *Clifton* v. *Hooper*, 6 Q. B. 468.

(*r*) *Stimson* v. *Farnham*, L. R. 7 Q. B. 175.

(*s*) *Perkinson* v. *Gilford*, Cro. Car. 539.

(*t*) *Vide supra*, p. 62.

(*u*) As in *Phillips* v. *Viscount Canterbury*, 11 M. & W. 619; *Botten* v. *Tomlinson*, 16 L. J. C. P. 138.

(*x*) *Withers* v. *Henly*, 2 Buls. 96; *Barker* v. *St. Quintin*, 12 M. & W. 441, where it is said (p. 450), "It is true that the sheriff is an officer of the Court, but the Court appoints him to do the plaintiff a service, and will not put him in motion, unless at the instance of the plaintiff. It is the plaintiff who is the party to give the sheriff notice to do or not to do anything. If it were otherwise the sheriff, upon every writ delivered to him, would be bound to proceed *in extremis*, until the party were brought into Court."

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Action for false return.

If the sheriff make a false return, *i.e.*, a return which is not true, and damage has resulted (*y*), an action can be brought against him. The action is an action on the case, the nature of which is similar to the action for negligence, to which reference has been made. The safest course, after a false return made, is to sue for both negligence and a false return (*z*).

Action by person against whom execution issued.

The person against whom execution is issued has an interest that the sheriff shall act properly in the performance of his duty under the writ, and has his remedy also. For example, where money, not properly due under the writ, has been extorted by the sheriff's officer, it may be recovered back from the sheriff by the person from whom it was extorted (*a*). And, again, if the negligence of the sheriff, or his behaviour in the execution, has resulted in damage to the person against whom execution has been enforced, he can proceed against the sheriff to recover it (*b*).

Where the sheriff remains in possession of the property of the defendant for an unreasonable time, and delays the execution, he becomes a trespasser *ab initio* (*c*). We have already pointed out, that after execution has been made a judgment debtor can resort against the sheriff to the summary jurisdiction of the Court to compel the return of the writ (*d*).

(*y*) *Stimson* v. *Farnham*, L. R. 7 Q. B. 175; 2nd Inst. 452.

(*z*) As was done in *Hobson* v. *Thelluson*, L. R. 2 Q. B. 642.

(*a*) *Woodgate* v. *Knatchbull*, 2 T. R. 148. The action was for treble damages. See Ch. Arch. Pr. 824, and pp. 156, 160, *infra*.

(*b*) *Carlile* v. *Parkins*, 3 Stark. 163. But it appears that in this case the element of malice was present. *Gawler* v. *Chaplin*, 2 Exch. 503.

(*c*) *Playfair* v. *Musgrove*, 14 M. & W. 293; *Ash* v. *Dawnay*, 8 Exch. 237. Where "licence is given to anyone by the law, and he doth abuse it, he shall be a trespasser *ab initio*." *Six Carpenters' Case*, 8 Rep. 146 a.

(*d*) *Vide supra*, p. 63.

SUB-SECT. (ii).—*Sheriff's Liability for Acts done not within the Mandate of the Writ.*

Acts done *ultra* the writ.

The sheriff's authority for what he does is the writ, and the writ alone; he stands or falls by it, so that where it is a nullity his acts done thereunder are illegal, and can be put right on summary process (*e*). To put the matter in another form, if any act of the sheriff is challenged, the writ is his justification. Now, the authority given by every writ may be said to be limited with respect to two matters; in the first place, the acts commanded to be done are defined, and in the second, the persons against whom, or in whose favour, those acts are to be performed are specified. Therefore, any act which is not defined by the writ is not authorized by it, and any person who is injuriously affected may proceed against the sheriff for having done that for which by the mandate of the writ he has no justification. As to such persons as are parties to the execution, we have already discussed, under sub-sect. 1, their remedy, when the injury to them results from neglect of duty on the part of the sheriff. That discussion was confined strictly to negligence in omitting what was commanded by the writ. It remains to consider injuries, both to parties to the execution and to third persons, taking place *ultra* the writ altogether.

Trespass is the nature of the injury.

Injuries sustained by persons in this manner are essentially the subject of actions for trespass, and as such are of three kinds: trespass to the person (assault, false imprisonment), or to land (*quare clausum fregit*), or to goods (*de bonis asportatis*, etc.). Every one of these kinds of trespass may be committed by a sheriff's officer, who has a writ or warrant for execution in his hands; and the sheriff is liable therefor, irrespective entirely of the particular writ of execution that has been issued.

Basis of liability of sheriff.

The grounds upon which the sheriff is liable for acts of trespass, which he himself has neither committed nor in

(*e*) See *Hooper* v. *Lane*, 6 H. L. C. 443; *Barlow* v. *Hall*, 2 Anstr. 461.

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any way been party to, have formed the subject of judicial discussion. It is said that the reason of the extended liability of the sheriff beyond that of an ordinary person for the acts of those to whom he delegates his authority, is that he is supposed to be executing his duty in person, as he is bound, in the first instance, to do. The impossibility of so doing authorizes him to delegate that authority to another, and he puts that party in his place, and for whatever that party does, not only when done *virtute mandati*, but *colore mandati*, the sheriff is responsible (*f*).

Illustrations of sheriff's liability.

The simplest case is where sheriffs' officers have acted as if there was in existence a writ of execution, whereas none has been issued. Then there is no writ (even if one be issued afterwards) which can justify the trespass, and, subject to proof of the bailiff's authority from the sheriff, the sheriff is liable (*g*). In other cases, a writ has been issued, but attempted to be enforced against a person, or against property, not specified therein. Here the acts of the sheriffs' officers are *ultra* the writ altogether. If, for example, under an *ejectio firmæ* of Whiteacre, the sheriff enters upon Blackacre, a trespass is committed, the writ having nothing to do with the matter. Again, an illustration is found in the similar case, where the sheriff had in his hands a writ of *fi. fa.*, directed to levy of the goods of Joseph Jarmain. There were two Joseph Jarmains, and the goods of the wrong one were taken. The sheriff was held liable. The writ of *fi. fa.* did not, in fact, authorize or justify the acts done under it (*h*). Again, where the bailiff, having a writ of *fi. fa.* in his hands, arrested the defendant instead of levying on his goods, the sheriff was held liable (*i*).

Semayne's case.

Somewhat different considerations arise where, in the course of the execution of a writ, some act is committed

(*f*) *Gregory* v. *Cotterell*, 5 El. & Bl. p. 585.

(*g*) *Hall* v. *Roche*, 8 T. R. 187.

(*h*) The action was trespass. *Jarmain* v. *Hooper*, 7 Sc. N. R. 663; see Dalt. p. 47.

(*i*) *Smart* v. *Hutton*, 8 A. & E. 568, n.

which in terms is not authorized by it. Here the fact of the execution is not separable from the injury, and the writ must always form an element in the case. The leading authority on this point is *Semayne's case* (*k*). It appears to be more convenient to discuss in detail the principal resolutions of law in that case under the particular writ which it most affects, that is to say, the writ of *fieri facias*. The decision itself may, in fact, at the present time be said only to apply to the execution of that writ, changes in the law having taken away its application to other writs. It was long ago decided that most probably the principle had no application to writs of *ca. sa.* (*l*). Writs of attachment would appear to be covered by this authority. And as to the writ of *elegit*, by the Bankruptcy Act of 1883 it no longer applies to goods (*m*). The most important resolution come to in the case was, that where the sheriff does what he has, in terms, no authority to do, viz., breaks into the defendant's premises, the breaking in may found an action of trespass or case against the sheriff, but the execution is nevertheless good and valid (*n*). It thus appears that the authority given by the writ to levy of the defendant's goods is a justification of the sheriff for so doing, but not for the act of trespass. At the same time it has been decided that the sheriff cannot return that a house is barricaded, and he cannot enter to see what goods are there; but he must return whether there are goods

(*k*) 5 Rep. 91.

(*l*) *Hooper* v. *Lane*, 6 H. L. Ca. 443; notes in S. L. C.

(*m*) The whole principle of *Semayne's Case*, so far as it decides that the sheriff has no authority to break open at the suit of a private person, has been doubted by so high an authority as Lord Redesdale. *East India Co.* v. *Kynaston*, 3 Bli. p. 164.

(*n*) The very powerful judgment of Bramwell, B., in *Hooper* v. *Lane*, 6 H. L. Ca. p. 453, shows the reasoning on which this principle is based, and is well worth an attentive perusal. This dictum is worthy of notice, "It seems to me, then, that the authorities . . . . justify me in saying, that an execution, however irregularly executed, is good for the benefit of the party when he is void of blame:" p. 472.

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of the defendant or not (*o*). The last resolution in the judgment in *Semayne's case* practically lays down that a stranger may not hide away in his house the defendant's goods, and then sustain trespass against a sheriff who breaks in and executes the writ. The sheriff is justified, in such a case, in breaking in.

Writ justification for those acts only which it expressly authorizes.

For our present purpose these illustrations show that the sheriff and his officers can lawfully do those things only which are commanded in terms by the writ itself. The writ is (with the somewhat doubtful exception of the case last mentioned (*p*)) no defence or justification for any other act.

Liability of person pursuing execution.

Besides the sheriff and his officers, the person who sets him in motion, and who is pursuing the execution, may, in certain events and on certain well defined grounds, be made liable for injurious acts. It is clear, however, that to his liability different considerations apply from those which we have been engaged in discussing. He is not (except, perhaps, where he is, as in the case of a writ of possession, necessarily present) an actual party to the execution. At the same time he is the motive power which sets the engine of the law to work. He may, therefore, be liable in two events:—Firstly, where he has instituted process maliciously and without reasonable or probable cause; and secondly, where he has specially authorized the trespass or particular act of negligence complained of.

Difference between liability of sheriff and party moving him.

In the first of these cases we have seen that the sheriff is completely justified by the writ under which he acts (*q*). If that is regular, he is not responsible for any damage, however serious (*r*). The position of the party is different.

(*o*) *Munk* v. *Cass*, 9 Dowl. 332.

(*p*) See the terms of the resolution as to covin and fraud, apparently pointing to this, that the sheriff would have to plead the same in any action brought against him for trespass under such circumstances.

(*q*) He need not show the writ to have been returned. *Cheasley* v. *Barnes*, 10 East, 73.

(*r*) He, of course, must stand or fall by the regularity of the writ and process thereon. And from this point of view the importance of the rules above referred to, with regard to the correspondence of the

Malicious execution.

He is not entitled to use the process of the Courts for purposes other than it was intended to be used (*s*). It is hardly within our province to discuss when an action for malicious prosecution will lie (*t*); but in order to show clearly the basis of the plaintiff's right in such a case, we cannot do better than adopt the language of the Court in the leading case of *Johnstone* v. *Sutton* (*u*).

Johnstone v. *Sutton*.

"There is no similitude or analogy between an action of trespass, or false imprisonment, and this kind of action. An action of trespass is for the defendant's having done that which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution which, upon the stating of it, is manifestly legal.

"The essential ground of this action is, that a legal prosecution was carried on *without a probable cause*. We say this is emphatically the essential ground; because every other allegation may be implied from this; but this must be substantively and expressly proved, and cannot be implied (*x*).

"From the want of probable cause, malice may be, and most commonly is, implied. The knowledge of the defendant is also implied.

"From the most express malice the want of probable cause cannot be implied."

And, again: "The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show it probable, or not probable, are true and

writ and the record, is very great. *Supra*, Chap. I. sect. 4. For a case of irregularity, where he was rendered liable, see *Hooper* v. *Lane*, 6 H. L. Ca. 443.

(*s*) See this proposition stated in the converse manner, *De Medina* v. *Grove*, 10 Q. B. 152, p. 176.

(*t*) It was said by Marshall, Serjeant, arguendo, in *Sinclair* v. *Eldred* (4 Taunt. 7): "This form of action was not known before the time of Lord Holt, when some cases of extraordinary malignity induced the Courts to entertain it."

(*u*) 1 T. R. 510, p. 544.

(*x*) The allegation of maliciously and without reasonable and probable cause is essential. For the judgment is good *inter parties* until varied. *De Medina* v. *Grove*, 10 Q. B. 152, and authorities there cited.

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existed is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law."

The sheriff is, of course, not liable in such an action.

These are the principles which must guide every one in deciding whether such an action is sustainable (*y*).

It remains to be said that it is immaterial what kind of legal process, whether *fi. fa.* or any other writ of execution, has been employed to put the judgment in force. Once prove damage to the person injured, and an action is well founded on the above principles (*z*). It is submitted, that where process is "irregularly, and therefore illegally," issued, the liability of the persons so issuing it is based upon the same principles. Process issued under such circumstances appears equivalent to "issued maliciously and without reasonable and probable cause" (*a*).

Party's liability for irregular execution.

As to the second of the cases above referred to, where a party has expressly authorized a trespass *ultra* the writ, or negligence in its execution, we have shown that the sheriff is always liable where damage results. But in order that the person moving the sheriff may also be made responsible, some express authority, in addition to the writ, must be shown (*b*). This is manifestly the case where the act complained of is what we have termed *ultra* the writ, because that document can alone be, so far as the process of the Courts is concerned, the authority given to the sheriff. It is submitted to be also necessary both where the act complained of is committed in the

(*y*) It should be borne in mind that the mere absence of probable cause for the proceeding will not of itself carry the right of action: the plaintiff must show absence of reasonable and proper care. *Arbrath* v. *North Eastern Rail. Co.*, 11 Ap. Ca. 247.

(*z*) For authorities, see the able note to Bull. & Leake's Pleading, p. 350, and *Gough* v. *Cribb*, 11 M. & W. 497.

(*a*) *Vide supra*, p. 87, and *Barker* v. *Braham*, 2 Wm. Bl. 866.

(*b*) "And it is held, that a trespasser may be, not only he who does the act, but he who commands, or procures it to be done." *Barker* v. *Braham*, 2 Wm. Bl. 866, p. 868.

course of the execution, and where the wrong is the result of mere neglect of duty on the part of the sheriff.

There are, however, in the books many expressions which might well lead to the conclusion, that, by reason of the relation existing between the sheriff and the person placing the writ in his hands, that person is liable for injuries resulting in any manner from the actual execution of process.

As the examination of these expressions will throw some light on the true position of the sheriff and the person moving him, we will proceed to their explanation.

Relation between party and sheriff.

Agency.

In a recent work on the law of the sheriff, it is stated, that "the sheriff is the plaintiff's agent for the purpose of the execution, and must obey an order not to execute" (*c*). It is submitted, that the term agent is here misapplied altogether (*d*). The sheriff, by the mere fact of the writ of execution being placed in his hands, does not represent the plaintiff in any true sense, nor by that act does the plaintiff become his principal (*e*). There is no reported decision, to the knowledge of the writer, where the person moving the sheriff has been rendered liable for an injury, without proof of specific authority from him, or his solicitor, for the act complained of (*f*).

Effect of indorsement on writ.

The indorsement on the writ of execution, stating who the execution debtor is, and where he resides, may, however, form such specific authority. If the indorsement thus made on the writ, and taken to be instructions given to the sheriff, is wrong, *i.e.*, untrue, the party pursuing the execution is liable for any trespass consequently committed; and this is so, although the untrue indorsement may have been made by the solicitor without the express

(*c*) The test of "agency" implied here is peculiar.

(*d*) See *Slackford* v. *Austen*, 14 East, 468; 8 C. & P. p. 215, n.; *Ramsey* v. *Eaton*, 10 M. & W. 22.

(*e*) There is no precedent of a suit in equity for an account on any such basis.

(*f*) For numerous authorities where plaintiff held liable, see 1 Wms. Saund. 103, n. (*g*).

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authority of his client (*g*). It follows that great care should be used by the solicitor in indorsing the writ. The liability of the client is limited to the consequences of acts which are strictly the duty of the solicitor, such as the indorsement above mentioned. The client cannot, therefore, be made liable for the results of verbal communications made by the solicitor to the sheriff's officer (*h*).

The indemnity of the party to the sheriff.

Every agent is entitled by law to an indemnity from his principal for performing lawful acts within the scope of his authority (*i*). But the sheriff is not by virtue of the writ, nor of his office, entitled to any such indemnity (*k*): in fact it was necessary before the Interpleader Acts, for him to apply to the Court to enlarge the time for him to return the writ in cases of adverse claims; so that the plaintiff might, if he wished the question litigated, enter into an express indemnity to the sheriff (*l*). It is true that the sheriff can recover when the person moving him makes a representation or gives him express authority on which he acts, in case that representation or authority causes him loss or damage (*m*). It is said, that such a representation is evidence of *an implied contract* to indemnify, apart altogether from the principles of agency. This shows that the relationship does not exist; for where it is once established, the indemnity follows as a necessary legal consequence.

Representation to the sheriff.

Further test of agency—death of party.

Again, we have already seen that where the writ is in the sheriff's hands, and the person moving him dies, he

(*g*) *Jarmain* v. *Hooper*, 7 Sc. N. R. 663. See, also, *Bates* v. *Pilling*, 6 B. & C. 38; *Cameron* v. *Lightfoot*, 2 Wm. Bl. p. 1192.

(*h*) *Smith* v. *Keal*, 9 Q. B. D. 340, where *Jarmain* v. *Hooper*, *ubi supra*, is distinguished.

(*i*) Story on Agency, § 339.

(*k*) It was once disputed, that an indemnity to the sheriff could be recovered upon, but held otherwise. *Arundel* v. *Gardiner*, Cro. Jac. 652.

(*l*) *Rex* v. *Sheriff of Devon*, 1 Chit. Rep. 643, and note, for authorities collected. *Ledbury* v. *Smith*, 1 Chit. Rep. 294.

(*m*) Without an express indemnity the sheriff cannot maintain his action, except apparently on the representation of the person moving him. *Humphrys* v. *Pratt*, 5 Bli. (N. S.) 154; *Dugdale* v. *Lovering*, L. R. 10 C. P. 196, and judgment of Brett, J.

must, in certain cases, still go on (*n*). This is conclusive against the existence of agency. We need further only point to the nature of the actions sustainable at common law against the sheriff.

There is authority of the highest nature for terming the sheriff an agent, but in most cases the statements to that effect are modified by some qualifying phrase (*o*). It is submitted that, for the sake of clearness, the term should be discarded altogether.

We arrive at the real basis of the suitor's liability when we allege, that he is answerable only for those acts which he expressly authorizes (*p*).

Rule of pleading founded on above consideration.

The contrast between the liability of the sheriff and that of the suitor is, in rules of pleading, well exemplified thus:—The sheriff (being bound to proceed when required so to do (*q*)) pleads as his justification the writ delivered to him to execute (*r*). The suitor (being bound to show the regularity of his process as well as the sheriff's) pleads as his justification both the judgment and the writ of execution (*s*). It follows that the suitor may be liable, in the case of malicious prosecution, or irregularity in the judgment and proceedings, for the wrongful act, while the sheriff, the process to him being regular, is not (*t*).

(*n*) *Vide supra*, Chap. I. sect. 3, sub-sect. (iv); Tidd's Pr. 1245.

(*o*) Bramwell, B., in *Hooper* v. *Lane* (6 H. L. Ca. 443, p. 468), says the sheriff is "to some extent an agent of the execution creditor, or at least his acts are to some extent the acts of the suitor." See Martin, B., in *Barker* v. *St. Quintin*, 12 M. & W. 441.

(*p*) It may be observed that on principle, not only is the plaintiff or suitor liable, but also his attorney, if he have authorized or procured the wrongful act. *Barker* v. *Braham*, 2 Wm. Bl. 866; *Bates* v. *Pilling*, 6 B. & C. 38.

(*q*) *Withers* v. *Henly*, 3 Buls. 96; Cro. Jac. 379; *Barker* v. *St. Quintin*, 12 M. & W. 441.

(*r*) In the same way, the vendee from the sheriff under a writ of *fi. fa.*, in an action in which he and the former defendant are parties, *e. g.*, ejectment of a term sold, need not produce the judgment, the writ is sufficient. *Doe* d. *Batten* v. *Murless*, 6 M. & S. 110.

(*s*) *Cotes* v. *Michill*, 3 Lev. 20; *Bryant* v. *Clutton*, 1 M. & W. 408; *Andrews* v. *Marris*, 1 Q. B. 3, p. 16; Bull. & Le. Pl. 770.

(*t*) See *Collett* v. *Foster*, 26 L. J. Ex. 412; *Carrett* v. *Smallpage*, 9

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Regularity of process a justification.

So long as the judgment or order stands, it will justify a regular writ of execution based thereupon; and so long as the writ of execution is not set aside, it will justify (unless it is on its face a void proceeding) all acts in due course done under it. A party, therefore, deeming himself injured by acts done under and not *ultra* the judgment and writ, must first set aside, as illegal or irregular, such judgment or order, as the case may be (*u*). The mere fact, however, that a judgment or order can be set aside, is not of itself sufficient to show that the proceedings under it were unjustifiable; and clearly, where it is subsequently reversed as being wrong in point of law, all regular process under it before the appeal is heard is good, and affords a justification to all parties acting under it (*x*).

Regular judgment reversed on appeal.

East, p. 346; *Perkins* v. *Plympton*, 5 M. & P. 731; 7 Bing. 676. The irregularities which made the executions in these two last-mentioned cases invalid would be almost impossible to happen now. *Vide supra*, p. 35; *Turner* v. *Felgate*, 1 Lev. 95. The sheriff may justify under the writ, although it be void. *Parsons* v. *Loyd*, 3 Wils. 341. Nares, J., took broad safe ground for his judgment!

(*u*) *Jones* v. *Williams*, 8 M. & W. 349.

(*x*) *Williams* v. *Smith*, 14 C. B. N. S. 596; *Smith* v. *Sydney*, L. R. 5 Q. B. 203; 39 L. J. Q. B. 144. See authorities on this subject, summarized, Ch. Arch. Pr. 831 *et seq.*

CHAPTER III.

THE WRIT OF POSSESSION.

It is intended in this Chapter to treat of the enforcement of judgments and orders for the recovery of land.

By O. XLII. r. 5,—"A judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession." O. XLII. r. 5. Writ of possession.

By r. 1 of O. XLVII., which is headed "Writ of Possession,"—"A judgment or order that a party do recover possession of any land may be enforced by writ of possession in manner before the commencement of the principal Act used in actions of ejectment in the Superior Courts of Common Law." O. XLVII. r. 1. Judgment for possession enforceable by writ of possession.

By O. XLVII. r. 2,—"Where by any judgment or order any person therein named is directed to deliver up possession of any lands to some other person, the person prosecuting such judgment or order shall, without any order for that purpose, be entitled to sue out a writ of possession on filing an affidavit showing due service of such judgment or order, and that the same has not been obeyed." O. XLVII. r. 2.

The two last rules appear to be simply an amplification of the first.

The writ of possession prescribed by the rules (*a*) is in the following form:— Form of writ of possession.

"Victoria by the grace of God, &c.

"To the sheriff of greeting:

"Whereas lately in our High Court of Justice, by a

(*a*) O. XLII. r. 14.

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judgment of the Division of the same Court [A. B. recovered] *or* [E. F. was ordered to deliver to A. B.] possession of all that with the appurtenances in your bailiwick: Therefore, we command you that you omit not by reason of any liberty of your county, but that you enter the same, and without delay you cause the said A. B. to have possession of the said land and premises with the appurtenances. And in what manner, &c.

"And have you there then this writ.

"Witness, &c." (*b*).

It is almost needless to observe that this writ must, like all other writs of execution, conform to the general principles and rules discussed in Chapter I., *supra*.

Sect. 1.—Nature of the Judgment or Order for Possession.

It will be seen immediately that the writ of possession, if not the simplest in its working and effect of all writs of execution, is at least as simple as any. It is not strictly necessary to an explanation of the practice with reference to this writ, that the nature of the judgment or order it enforces should be discussed; but the position of the suitor, both before and after execution completed, will be much better understood if we bear in mind the kind of proceeding which leads to it. We will attempt, therefore, a short summary of the law relating to judgments and orders for recovery of land. The digression, however, is not intended to be an exhaustive exposition of the law on the subject.

Judgments for recovery of land prior to Judicature Acts.

Prior to the Judicature Acts there were different modes of recovering the possession of land, according as it was the subject of proceedings at law or in equity. In the

(*b*) R. S. C. App. H. Form No. 8; Appendix *infra*, Form No. 26, and note.

Courts of law, the proceeding was called an action of ejectment; in Chancery, the remedy was by suit, the final decree in which took the form of an injunction. For convenience, and with a view to follow the language of the Rules of Court, proceedings in the nature of either of these remedies may be called an action for recovery of land.

Action of ejectment.

The action of ejectment had a long and eventful history. It was based upon a fictitious statement of facts, which the parties to the proceedings were not allowed to dispute (*c*). We are not concerned to inquire into the nature of these fictions; but it is of interest to us to ascertain the reasons for the judgment which was given in the action, because it is distinctly the lineal ancestor of that which is given at the present day, and owes its form and substance to the same principles.

Where action of ejectment lay.

The action of ejectment was applicable only where the plaintiff alleged a title by estoppel, or a legal title to the land in dispute; and it could not, therefore, be brought where the plaintiff had an equitable estate only (*d*). The judgment obtained was, in its essential part, as follows:— "Therefore it is considered, that the said John Doe do recover against the said C. D. his term yet to come of and in

(*c*) The anomalous procedure was not wholly swept away till the Judicature Acts, though the amendments introduced by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), abolished the hitherto attendant fictions, and gave a special form of action. The nature of these fictions has been most ably set forth in works of great learning on the subject: Cole on Ejectment; Tidd's Practice, 1218 *et seq.*; 1 Sp. Eq. Jur. 232. There is no doubt the fiction was invented, adopted, and perfected to give the Courts a jurisdiction which, without its existence, they did not possess. It had, as its basis, an interest in land, viz. a term of years, unknown and foreign to the feudal system of estates. The feudal method of procedure by real actions was by means of it avoided; and certain principles (founded on the actual question in the fictitious action, the right of entry) were established, which still govern in actions for the recovery of land, wherever legal, as distinguished from equitable, rights are in question. A sufficiently complete summary of the history of the action of ejectment is to be found, 3 Steph. Com. 404 *et seq.*

(*d*) Cole, Eject., 287.

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the tenements, etc." (*e*). The term of years thus mentioned in the judgment was a fictitious term—it had no existence—and the legal right to land, which was vested in the owner of a term, was a right to possession merely (*f*). When, therefore, the proceeding alleging on behalf of the plaintiff a fictitious term was abolished, the question left for trial in every action of ejectment was, and still is, the question of right to possession only (*g*). And so the judgment in an ordinary action for the recovery of land runs as follows:—"It is adjudged that the plaintiff recover against the defendant possession of the said land in the said writ mentioned, etc." (*h*). Except so far as the proceedings operate as an estoppel, which, in strict theory, is a collateral result only, the title to land is no part of the question decided by the judgment, the effect of which is summarised in a learned work (*i*) as follows:—"By a judgment in ejectment the claimant recovers *only the possession* of the land claimed, or some part thereof (with or without costs), but *not any particular estate or interest therein*. His right and title to the land are precisely the same as if he had never been disseised or dispossessed. If he has a freehold, he is in as a freeholder; if he has a

Form of judgment.

Effect of a judgment in ejectment.

(*e*) Tidd's Pr. Forms, 648.

(*f*) To put the matter plainly, if technically, there is no ownership of land recognized in our system of law as being in any subject. This or that person who has land holds only an estate in it, and his rights depend, first upon his title to, and, secondly upon the quality of, that estate, *e. g.*, for life, in fee, &c. (See Aust. Lect. ed. 1869, p. 818.) There is, however, no process now known whereby that title to which we have just referred can be ascertained and fixed, so as to give the person alleging it a right, having the force of a judicial statement, in respect to the land. When it existed, the system of real actions constituted a procedure of this nature. They were strictly feudal process, and after having fallen out of use, except as a means of conveyance (3 Bl. Comm. 110), were abolished in the last reign (3 & 4 Will. IV. c. 27). For an account of the nature of a recovery as a conveyance, see Preston on Conveyancing, vol. i.

(*g*) See forms in Sched. A. to Com. L. P. Act, 1852.

(*h*) Chitty's Forms, p. 595.

(*i*) Cole on Ejectment, p. 76.

chattel interest, he is in as a termor; and in respect of the freehold his possession enures *according to right*. If he has no title, he is in as a trespasser; and without any re-entry by the true owner is liable to account for the profits." (*Per cur.*, in *Taylor* d. *Atkins* v. *Horde*, 1 Burr. pp. 90, 114; Ad. Eject. 286, 308) (*k*). In short, the subject of the action being the right to possession, the judgment itself has no effect beyond declaring that right.

The estoppel of the judgment and record of the proceedings may well be of the greatest importance to a suitor, and, therefore, in most cases, the record should be completed, and the writ of possession, with the return thereof, duly made and filed. As between the parties to the action, doubtless, the file of the proceedings, including the judgment, is sufficient; but in subsequent dealings with the land, the writ and return are valuable evidence of title, and of the completion of the judgment (*l*).

Equitable remedy for recovery of land.

Land, or, rather, an equitable estate in land, might become, and did, in fact, frequently become, the subject-matter of suits in equity. The decree in such a case was, of course, in form merely personal, directing the one party to deliver land to another (*m*). The person in whose favour such a decree was made was not, however, bound to proceed to its enforcement by process for contempt. On proof of due service of the decree, and on application, a writ of assistance would be ordered to issue directed to the

(*k*) See further, *Aslin* v. *Parkin*, 2 Burr. 665; *Outram* v. *Morewood*, 3 East, 346; *Wilkinson* v. *Kirby*, 15 C. B. at p. 443.

(*l*) It is probably with a view to the value of the writ and return as a muniment of title, that it is said it should be written on parchment. (Dan. Ch. Pr. 948, n. (*d*).) Where any question of seisin arises, it is manifestly of importance to have the record complete. As distinguished from seisin, the mere possession given under the writ had but little effect in conveyancing. The fact of possession may become of importance, however, in some cases, *e.g.*, in a question under the stat. 32 Hen. VIII. c. 9, against embracery, pretenced titles, &c.

(*m*) In cases where legal title was in question, the parties were directed to try the matter at law by action of ejectment.

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sheriff (*n*). This writ was somewhat more extensive in terms than the writ of possession (*o*). It has been decided that the writ of possession is now substituted for the writ of assistance (*p*). In suits in Chancery, however, an order for the possession of land was generally claimed merely as a part of the relief prayed in the suit.

Now no writ of assistance.

Usually the decree declared that some person was a trustee, and in that capacity should, subject to the terms of the trust, deliver possession, or the like. It would be going out of our way to inquire what actions, formerly belonging to the exclusive jurisdiction of the Court of Chancery, are now included in the term "action for recovery of land" (*q*); but it is clear that an action for recovery of land may now be brought to recover possession, whether the plaintiff's title is legal or equitable, and the judgment or order may be enforced by writ of possession. The second rule of O. XLVII., above quoted (*r*), is specially framed to meet the case where the judgment is personal in form, that is to say, where it directs or commands one person to deliver to the other (*s*).

The present action for recovery of land.

When writ of possession can issue.

Receiver's right to the writ.

With reference to the words "judgment or order," it may be pointed out that it is not only on final judgment that possession may be ordered to be delivered. For example, there may be an order for a receiver to take possession, in which case there seems no doubt that, under the terms of the rule, he might enforce his possession by

(*n*) Dan. Ch. Pr. 5th ed. 923.

(*o*) Seton, Decrees, 1562.

(*p*) *Hall* v. *Hall*, 47 L. J. Ch. 680.

(*q*) An action for foreclosure is not, within the meaning of the rule, an action for recovery of land, although there is usually a claim for possession. *Tawell* v. *Slate Co.*, 3 Ch. D. 629. An action for a declaration of title is also not such an action. *Gledhill* v. *Hunter*, 14 Ch. D. 492.

(*r*) P. 93, *supra*.

(*s*) The effect of this upon the suitor's right to process for contempt will be discussed in a later Chapter. It is suggested in Ch. Arch. Pr. p. 1227, that "the form of judgment intended by this rule is only used when judgment is signed on an award." Such a construction is, it is submitted, much too narrow.

means of the writ. The same consequence follows where, in an action for foreclosure, an order is made against the defendant for delivery of possession of the mortgaged premises (*t*).

Foreclosure, *e. g.*

Before we discuss the writ of possession itself, it may be worth while to ascertain the limits of the right of the successful suitor to enter upon the land without the assistance of the writ at all. In the books relating to this part of our subject, it is suggested to be unsafe to enter into possession of land in pursuance of a judgment, unless under a writ of *hab. fac.* (*u*). It is submitted, however, that this position cannot be upheld, but that, on the contrary, possession so taken is safe. It is clear that whoever can maintain an action for recovery of land may enter peaceably without action (*x*). If the person entitled to possession brings his action, and recovers judgment, we have already seen that the defendant is estopped from denying the rightfulness of the plaintiff's title (*y*). Now, if after judgment the plaintiff enters, he enters by virtue of his title, and not under the judgment (*z*). This is entirely in accordance with principle. The reason of the doubts seems to have been the decision in *Doe* d. *Stephens* v. *Lord* (*a*).

Right to enter after judgment without writ of possession.

(*t*) See O. XVIII. r. 2; and Chitty, J., in *Wood* v. *Wheater*, 22 Ch. D. 281.

(*u*) Adams, Eject. p. 299, and p. 344, where it is said, "It would be imprudent to enter into possession after judgment without writ." Wats. Sher. 317; Cole, Eject. 344.

(*x*) *Butcher* v. *Butcher*, 1 Man. & Ryl. 220, p. 221, n. (*c*); 7 B. & C. 399; *Barnett* v. *Earl of Guildford*, 11 Exch. 19, p. 32; *Butler* v. *Wallis*, Cro. Eliz. 463; Cole, Eject. 73, 689; other authorities, Ch. Arch. 14th ed. 1201.

(*y*) *Vide supra*, p. 96; *Wilkinson* v. *Kirby*, 15 C. B. 430. The point in this case seems to have been a mere technical question, whether or not estoppel of record could be pleaded where the completion of the estoppel depended upon matter *in pais*. The main principle referred to in the text is, however, fully affirmed.

(*z*) *Badger* v. *Floid*, 12 Mod. 398. It was there said that in the Exchequer they had laid a plaintiff "by the heels" for entering without writ when writ of error brought; and Holt, C. J., said it must have been by virtue of their equitable power! *Wilkinson* v. *Kirby*, 15 C. B. 430.

(*a*) 7 Ad. & El. 610. See particularly the somewhat unguarded words of Patteson, J., p. 614.

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This case raised, in reality, the question whether a suitor can, by issuing a writ of possession to which he was not entitled, enforce a judgment in his favour. Of course not; and as he pretends to an authority from the Court which he has not, it is an abuse of the process of the Court. It may be taken, therefore, that the right of the suitor to enter is unaffected by the action or the judgment.

It is no objection to the writ issuing that, although the term of years upon which the action was brought was in existence when the action was commenced, it had determined before judgment. The defendant is bound to show affirmatively that the plaintiff in such case has no title (*b*).

This writ was almost identical in form with the *habere facias seisinam*, the usual method of execution in real actions.

Sect. 2.—Nature of the Writ and Execution thereof.

The judgment or order for possession having been made, the suitor is entitled thereupon to his writ of possession (*c*). Although, under the words of O. XLII. r. 8, the writ of possession is not one of the "writs of execution" to which the rules expressly apply, it is submitted that the ordinary provisions with reference to writs of execution, for example, rr. 11, 12, and 13, provide for this writ (*d*). Any construction of the rules which did not allow of this conclusion would leave the issue of this writ to the regulations and practice in force before the Judicature Act, and there appears to be no reason for the longer existence of the anomalous practice which then existed.

Application of O. XLII. to this writ.

Material words of mandate.

The material words of the mandate in the writ are, "and without delay you cause the said A. B. to have

(*b*) *Gibbins* v. *Buckland*, 1 H. & C. 736; *Knight* v. *Clarke*, 15 Q. B. D. 294.

(*c*) Tidd's Pr. 1244; for form, with note as to costs, see Appendix, *infra*, p. 404, Form No. 26.

(*d*) Daniell's Ch. Pr. 948 *et seq.*

possession of the said premises, etc." It is, therefore, essential to the due execution of the writ that the plaintiff, A. B., or some person authorized by him, should be or come upon the land with the sheriff's officer to be let into possession. If no such person appears, the sheriff cannot, in the nature of things, obey the mandate, and a return to that effect is a good return (*e*). The necessary presence of the suitor or his agent at the execution renders the duty of the sheriff comparatively simple. The authority of the person pursuing the judgment necessarily precedes any act by the sheriff's officer, who is consequently taken as acting under his directions. The responsibility being thus in a great measure upon the plaintiff, there is not the same necessity in judgments for recovery of land to set out the parcels with minute care. Lord Abinger expresses himself thus:—"It has been an established rule in actions of ejectment, ever since I have known the law, that when the plaintiff recovers a verdict, although he proves a title to part only, he may take his verdict generally, unless it is otherwise consented to or arranged at the trial; but it is at his peril what he takes possession of under the execution" (*f*).

Presence of party at execution.

Consequent responsibility of plaintiff for the execution.

The precise description of the land, which was thus ruled to be unnecessary in the verdict and judgment, is not requisite in the writ of possession. The writ is not invalid, therefore, because of its authorizing the sheriff to deliver land of which the boundaries are not accurately defined (*g*). There is no doubt that where

(*e*) Wats. Sher. 322; Cole on Ejectment, 345. See form of return in Appendix, *infra*, p. 404, Form No. 27.

(*f*) *Doe* d. *Davenport* v. *Rhodes*, 11 M. & W. 600, at p. 608. See *Roe* d. *Blair* v. *Street*, 2 A. & E. 329.

(*g*) Lord Mansfield's observations in the case of *Cottenham* v. *King*, 1 Burr. 623, at p. 629, are of some interest. He there, after mentioning that formerly when ejectment was compared with real actions it was more fettered, says: "Even in a *præcipe* I do not know whether the sheriff could always be quite certain which were the particular acres, etc., of which he was to deliver possession. But in this ficti-

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injury would be likely to happen from the want of description, or misdescription, in a writ of possession, the Court would put it right; but so long as it accords with the judgment its mere indefiniteness does not appear to affect its validity (*h*).

Sheriff's duty.

The sheriff must deliver complete possession to the plaintiff, and instal him in such premises as are pointed out (*i*). It is impossible, in an ordinary case, to do this without turning everyone else out of possession (*k*). The authority given by the writ is wider in this case than in those of most other writs of execution. The rule in *Semayne's case*, which is expressed (with no great regard for exactness), "the house of everyone is to him as his castle and fortress, as well for his defence against injury as for his repose" (*l*), has no application to this writ; for by the second resolution it was resolved:—"When any house is recovered by any real action, or by *ejectio firmæ*, the sheriff may break the house and deliver the seisin or possession to the demandant or plaintiff; for the words of the writ are *habere facias seisinam*, or *possessionem*, etc., and, after judgment, it is not the house, in right and judgment of law, of the tenant or defendant." This shows that the sheriff may be compelled to resort in some cases to actual

Resolutions in *Semayne's case.*

tious action, the plaintiff is to show the sheriff, and is to take possession at his peril, of only what he has title to; if he has taken more than he has recovered, the Court will in a summary way set it right." See *Connor* v. *West*, 5 Burr. 2672.

(*h*) It is very old practice to confine, by rule of Court, the suitor's right to issue execution to certain lands only. *Doe* d. *Forster* v. *Wandlass*, 7 T. R. 118 *in notis; Brookes* d. *Mence* v. *Baldwin*, Barnes, 468; Adams on Ejectment, 300. See Appendix, *infra*, Form No. 29, p. 404.

(*i*) It is not meant, of course, that the sheriff can be required by the plaintiff to commit a trespass; *e.g.*, where upon the face of the writ it appears that the land which the plaintiff points out was not the land the subject of the action, the sheriff would not be required to deliver possession. See Wats. Sher. 322 (*x*).

(*k*) *Upton* v. *Wells*, 1 Leon. 145, where persons hid in the house effected dispossession after the sheriff, and the Court, holding that there had been no execution in fact, awarded a new writ.

(*l*) First resolution.

violence, and is justified in doing so. He should, therefore, when it is apprehended to become necessary, call the *posse comitatus* to his assistance (*m*).

The way in which possession is delivered.

As to the actual delivery of possession, the sheriff is under no duty to deliver each house or each acre separately where all which have been recovered are in the occupation of one person, but he may deliver one house or one acre in the name of the whole (*n*). But if the several houses recovered are in the possession of several persons, the sheriff must deliver each house separately, and one in the name of all is not sufficient (*o*). Where the judgment is for an undivided part of premises, it appears that the other persons in possession should not be ousted; for example, where judgment was given for five-eighths of a cottage, it was held that the sheriff exceeded his duty in turning the tenant of the remaining three-eighths out of possession (*p*).

Sheriff's return, what it should contain.

The sheriff must be in a position to return particularly of what acres, lands, and premises he has put the plaintiff into possession (*q*). And there can be no doubt but that on a false return the sheriff may be sued (*r*); for, as has been pointed out, it is possible that the completed record may be of importance to the parties.

Relationship between party pursuing execution and sheriff.

The general principles on which the sheriff is made responsible in putting in force the execution have been already discussed. They are, of course, the same in this case as in that of other writs. It is submitted, however,

(*m*) As to raising the *posse comitatus*, see Wats. Sher. p. 73; 50 & 51 Vict. c. 55, s. 8.

(*n*) Haughton, J., in *Floyd* v. *Bethill*, 1 Roll. Rep. 421.

(*o*) Roll. Abr. tit. Execution (H), 2. Though, if the persons in possession will attorn to the person pursuing the execution, and he consents thereto, there is, of course, no end to be gained in dispossessing them.

(*p*) *Roe* d. *Saul* v. *Dawson*, 3 Wils. 49.

(*q*) See form of return, Appendix, *infra*, p. 404, Form No. 28. It does not suffice for the sheriff to deliver one acre in the name of the whole. *Molineux* v. *Fulgam*, Palm. 289.

(*r*) Wats. Sher. 322

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that, as between the sheriff and the person moving him, the latter can seldom have any good ground of action (*s*), and, on the other hand, may well be liable to the sheriff. When he points out to the sheriff the lands he alleges himself to have recovered, he makes a representation on which an implied contract to indemnify will arise (*t*). It follows that although, where a trespass is committed in the course of the execution, both plaintiff and sheriff are liable to the person injured, the sheriff has his remedy over against the plaintiff.

Contempt by interference with sheriff.

Where there is any interference with the execution of the writ, the offenders commit a contempt of Court (*u*). The precise time at which the suitor can be said to be in possession is difficult, if not impossible, to define, though it is stated not to be a complete execution until the sheriff or his bailiffs deliver the possession to the party, and are gone away (*x*). When he is once installed, and can be said to be in quiet possession, a person interfering is a mere trespasser, and clearly commits no contempt. If, straightway upon the withdrawal of the sheriff's officers, the defendant ejects the plaintiff, he no doubt commits a contempt, and can be attached (*y*); but the case is different where the plaintiff has been installed for some time, for example a fortnight; there he is relegated to his action of trespass (*y*).

(*s*) See, for example of successful action against sheriff for damages for delay in execution of writ of *hab. fac. poss. Mason* v. *Paynter*, 1 Q. B. 974.

(*t*) *Vide supra*, p. 90. *Dugdale* v. *Lovering*, L. R. 10 C. P. 196. Formerly, a sheriff always demanded and obtained an indemnity from the lessor of the plaintiff in ejectment before proceeding to execute the writ. Tidd's Pr. 1245. This was because the plaintiff was a fictitious person altogether. When, however, the procedure was changed by the C. L. P. Act, 1854, the sheriff ceased to be able to require it. Cole on Ejectment, 345.

(*u*) As to power under stat. 8 Hen. VI. c. 9, of judge of assize to grant warrant of possession after bill found by grand jury for forcible entry, see *Reg.* v. *Harland*, 8 A. & E. 826.

(*x*) *Kingsdale* v. *Mann*, 6 Mod. 27.

(*y*) *Style's case*, 2 Br. & Goldsb. 216, 253. Where the disturbance took place eight or nine hours after the sheriff's officers had left, it was

At the time when the writ of *hab. fac.* was returnable on a day certain in term, in all such cases as those above mentioned, where the sheriff returned the facts, a new writ might be issued. But where the return that he had given possession was made and actually filed, the record being complete, and the Court entitled to it, no new writ would be allowed, for the reason that an *alias* writ could not issue after the writ had been executed (*z*).

New writ on same judgment where interference has stopped due execution.

If the trespasser upon the plaintiff to whom possession has been given is a stranger to the action, it will require something more than the mere fact of trespass to render him liable in contempt. He must, at any rate, have known of the sheriff's execution, and have intended to thwart it. On principle, the procedure against such a third person could, as a rule, be a new action only.

Where person interfering a stranger.

At the present time, as we have seen, the writ is returnable immediately after execution thereof (*a*). The execution is good whether the writ is returned or not. The discussion on the subject of *alias* writs (*b*) is therefore material here. There should be, in the nature of things, no necessity for a second or *alias hab. fac.*, issuing after the attempted execution, or partial execution, of the first. If, however, it is determined that the practice under the present rules is to continue as formerly in the issue of *alias*

Present practice where due execution interfered with.

held that an attachment ought not to go forthwith, but a rule to show cause. *Kingsdale* v. *Mann*, 6 Mod. 27. The practice in Ireland seems to be to renew the writ of possession. *Stacpoole* v. *Walsh*, 6 L. R. Ir. 444.

(*z*) *Doe* d. *Pate* v. *Roe*, 1 Taunt. 55. In *Devereux* v. *Underhill*, 2 Keb. 245, it is stated that "the party hath election to return the writ or not, and may renew it at pleasure, till an effectual execution be had, albeit the party had actual execution; yet if there were any sudden expulsion of him he shall not be estopt; also if the sheriff give seisin but of part he may have new *hab. fa.* for the rest." This was the law when the writ was returnable on a day certain. Now it is practically obsolete. *Kingsdale* v. *Mann*, 6 Mod. 27; 2 Br. & Goldsb. 253; Tidd's Pr. 1247; *Ratcliff* v. *Tate*, 1 Keb. 779; *Lessee of Linehan* v. *Anthony*, Batty, Ir. R. 453.

(*a*) *Doe* d. *Hudson* v. *Roe*, 18 Q. B. 806.

(*b*) *Vide supra*, p. 58.

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and *pluries* writs, the authorities last quoted (*c*) have considerable weight.

Reversal of judgment after execution. Restitution.

Where a judgment is reversed after the plaintiff has obtained possession, a writ of restitution may be awarded to the defendant (*d*). This was the proper process when appeal from judgments at law was only possible by writ of error. Where irregularity had led to an execution completed, the practice was not to issue a writ of restitution, but to obtain a rule to show cause why the offending party should not restore (*e*) Under the present practice, the judgment or order of the Court of Appeal would, in nearly every case, provide for the possession being re-delivered up, and in such case a new writ, not of restitution, but of possession, would be issuable on that provision of the order (*f*). Perhaps the writ of restitution is the necessary means of redress where, after being ordered to re-deliver the land, the plaintiff has absconded, and has not been served with the order (*g*). But where the order to restore has been made and disobeyed, the more correct course seems to be to proceed for the attachment of the disobedient party (*h*). The order to restore should be against the party in possession, not against or directed to the sheriff (*i*).

Position of person placed in possession by the sheriff.

It remains to refer, as shortly as possible, to the position of a suitor who has been installed in possession by the sheriff. The judgment gives him no title; the writ simply places him in possession. He, therefore, is in by the

(*e*) *Vide supra*, p. 59.

(*d*) Analogous case of order to restore under a writ of sequestration, and dictum of Lord Colchester thereon, *Pelham* v. *Harley*, 3 Swans. 291.

(*e*) *Doe* d. *Stephens* v. *Lord*, 7 Ad. & El. 610.

(*f*) Form of order to restore, Appendix, *infra*, No. 30, p. 405.

(*g*) *Doe* d. *Whittington* v. *Hards*, 20 L. J. Q. B. 406. The writ is clearly a judicial writ, and yet is not always founded upon matter of record.

(*h*) This is old practice, especially where the proceedings have been set aside for irregularity. Holt, C. J., *Anon.*, 2 Salk. 588. See *Davies* d. *Povey* v. *Doe*, 2 Wm. Bl. 892. See, also, note to *Stacpoole* v. *Walsh*, 6 L. R. Ir. 444.

(*i*) *Doe* d. *Williams* v. *Williams*, 4 N. & M. 259. See *Roe* d. *Saul* v. *Dawson*, 3 Wils. 49.

strength of his title, and is deemed, as against the defendant and all claiming under him, to have been in possession from the day he alleges his title to have accrued (*k*), so that he can support trespass for wrongful acts done to the land between that date and judgment. And where possession has been actually delivered under the writ, it may be set aside, together with the judgment on which it is founded, by a third person who is injured by the judgment, although he has received no notice of the action (*l*).

Poundage.

The sheriff is entitled, on executing a writ of possession, to poundage, on a scale which allows him one shilling in the pound for every pound of the yearly value of the land whereof possession is given, where the whole does not exceed the yearly value of 100*l.*, and sixpence in the pound for every pound per annum over and above the yearly value of 100*l.* (*m*).

Sheriff's fees.

The sheriff's fees, besides poundage, are given by the scale of fees made in pursuance of 1 Vict. c. 55, and will be found in the Appendix (*n*).

(*k*) From the day of the demise laid in the declaration. *Barnett* v. *Earl of Guildford*, 11 Exch. 19.

(*l*) *Jacques* v. *Harrison*, 12 Q. B. D. 165.

(*m*) 3 Geo. I. c. 15, s. 16, now repealed, except as to poundage, 50 & 51 Vict. c. 55, s. 39, and sub-s. (5). And see further, as to the law relating to poundage, *infra*, Chap. IV., sect. 4.

(*n*) *Vide* Appendix III., *infra*.

CHAPTER IV.

THE WRIT OF FIERI FACIAS.

THE usual method of enforcing a judgment for recovery of money is by realising, under the writ of *fieri facias*, the personal property of the judgment debtor (*a*). Recourse may also be had to his real property under the writ of *elegit*, which we shall discuss fully in the next Chapters.

Writ, when issuable.

On judgment being signed, or an order being made for payment of money, the creditor is entitled, generally, to issue his writs of *fi. fa.* and *elegit* as of right.

Fieri facias, or *elegit*, may issue for non-payment of money.

By rule 17 of O. XLII.,—"Every person to whom any sum of money, or any costs, shall be payable under a judgment or order, shall, so soon as the money or costs shall be payable, be entitled to sue out one or more writ or writs of *fieri facias*, or one or more writ or writs of *elegit*, to enforce payment thereof, subject, nevertheless, as follows:—

(a) If the judgment or order is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period."

We have already discussed sub-rule (b) of this rule, relating to stay of execution (*b*). We have also referred to the terms of O. XLII. r. 29, as to the order in which writs of execution may issue, and have concluded that,

O. XLII. r. 29. Order of execution.

(*a*) An interesting and succinct account of execution at common law, including specially the writs of *fieri facias* and *levari facias*, and their early history, is given in Gilbert on Executions. See, also, for the history of the writ of *fieri facias*, *Giles* v. *Grover*, 1 Cl. & F. 72. The writ of *levari facias* cannot now issue in civil proceedings. Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 146.

(*b*) *Vide supra*, p. 39.

notwithstanding that rule, and the alternative wording of the rule now under discussion, an execution creditor may issue all writs of execution at once, though he is bound subsequently to elect under which he will proceed (*c*).

Writs into different counties.

The execution creditor may, therefore, sue out a writ or writs into every county in which it is supposed that the execution debtor has property available under them or either of them. At the same time, the creditor must be careful to countermand every other writ than that on which he actually proceeds, or to modify his instructions on such other writ, according as he has received the whole or part of the debt, by a levy on any one of the writs.

Second writ after return of first.

We have already seen that, under the rules affecting all judicial writs alike, he is not entitled to issue (except in the case expressly authorized by O. XLII. r. 18, of a separate writ for costs) a second writ, directed to the sheriff of the same county as the first, without the return of the latter (*d*). This and the cases where leave to issue execution is necessary are the only ones where, under a judgment or order for payment of money, a *fieri facias* cannot be issued as of right by the suitor entitled thereto.

Payment into Court.

It should be mentioned, rather for the reason of more abundant caution than because it does not appear from the terms of rule 17 above mentioned, that neither a writ of *fieri facias* nor a writ of *elegit* is available to enforce a judgment or order for payment into Court.

Separate execution for costs.

By rule 18 of O. XLII.,—"Upon any judgment or order for the recovery or payment of a sum of money and costs, there may be, at the election of the party entitled thereto, either one writ or separate writs of execution for the recovery of the sum, and for the recovery of the costs, but a second writ shall only be for costs, and shall be issued not less than eight days after the first writ (*e*).

(*c*) *Vide supra*, p. 47.

(*d*) *Vide supra*, p. 59.

(*e*) For form of writ for costs, see Appendix, *infra*, p. 406, Form No. 33.

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Before this rule, a person issuing execution for the amount of his judgment only, without waiting to tax his costs, was deemed to have waived his right to such costs. This rule abrogates the former practice (*f*).

O. XLIII. r. 1.

Force of *fi. fa.* and *elegit*.

By O. XLIII. r. 1,—"Writs of *fieri facias* and of *elegit* shall have the same force and effect as the like writs have heretofore had, and shall be executed in the same manner in which the like writs have heretofore been executed."

Form of writ of *fi. fa.*

The form of the writ of *fieri facias* is as follows (*g*) :—

[*Heading of action or matter.*]

Victoria by the grace of God, &c.

To the sheriff of greeting.

We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of £ and also interest thereon at the rate of £ per centum per annum from the day of which said sum of money and interest were lately before us in our High Court of Justice in a certain action [*or* certain actions, *as the case may be*] wherein A. B. is plaintiff and C. D. defendant [*or* in a certain matter there depending intituled "In the matter of E. F." *as the case may be*] by a judgment [*or* order, *as the case may be*] of our said Court, bearing date the day of adjudged [*or* ordered, *as the case may be*] to be paid by the said C. D. to A. B., together with certain costs in the said judgment [*or* order, *as the case may be*] mentioned, and which costs have been taxed and allowed by one of the taxing officers of our said Court at the sum of £ as appears by the certificate of the said taxing officer, dated the day of . And that of the goods and chattels of the said C. D. in your bailiwick you further

(*f*) *Harris* v. *Jewell*, W. N. 1883, 216.

(*g*) Appendix H. Nos. 1 and 2, set forth in Appendix, *infra*, p. 406, Forms, Nos. 32, 33, where the modifications of the form, requisite under different circumstances, are also to be found.

cause to be made the said sum of £ [*costs*] together with interest thereon at the rate £4 per centum per annum from the day of (*h*), and that you have that money and interest before us in our said Court immediately after the execution hereof to be paid to the said A. B. in pursuance of the said judgment [*or* order, *as the case may be*]. And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution thereof. And have there then this writ.

Witness, &c.

As to direction to levy costs.

It will be observed that this form of writ provides for levying the costs in a manner similar to that providing for the levy of the principal sum. This clause is not always necessary at the present time; for under O. XLII. r. 18, which we have already noted (*i*), the party pursuing the execution may, within fourteen days of the judgment, issue a separate writ altogether for his costs. This separate writ may also be issued, under O. XLVII. r. 3, in the case where a writ of possession has been sued out and executed. In this last-mentioned case there seems to be no obstacle to the issue of the *fi. fa.* for costs at any time (*k*). The same is the case where a writ of delivery is the appropriate method of execution; see O. XLVIII. r. 2. The form of the *fi. fa.*, which is specially given for costs (*l*), is, in its operative part, identical with the ordinary writ, and the same considerations, as to property seizable and mode of enforcement, apply. For reasons which will more fully appear when we come to the discussion of writs of *elegit*, a *fieri facias* cannot be combined or incorporated with that writ (*m*).

Fi. fa. for costs after writ of possession.

Fi. fa. for costs after writ of delivery.

Form variable: *e.g.* on discontinuance.

The form of the writ may be varied to suit the circumstances of a particular case; for example, there being no

(*h*) As to interest, *vide supra*, p. 32.

(*i*) *Vide supra*, p. 109.

(*k*) Subject, of course, to the general provisions of O. XLII.

(*l*) See Appendix, *infra*, p. 406, Form No. 33.

(*m*) Although under sect. 146, Bankruptcy Act, 1883, an *elegit* no longer extends to goods.

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judgment or order for costs of the defendant on a discontinuance, and yet he being, under O. XXVI. r. 4, entitled to them, on application to a judge of the Chancery Division, a form of writ adapted to the case was ordered to issue (*n*).

Arrangement of subject of this Chapter.

It is proposed in this Chapter to treat of the law relating to the writ of *fieri facias*, according to the following arrangement:—

Sect. 1. Property available under the writ, and the duties of the sheriff with respect thereto.
2. The writs in aid of the writ of *fieri facias*.
3. The effect of certain statutes upon the duties of the sheriff under this writ.
4. The sheriff's right to poundage.

Sect. 1.—Property available under the Writ, and the Duties of the Sheriff with respect thereto.

Mode of discussing subject.

It will be found a convenient method of discussing this subject to take *seriatim* for explanation the phrases of material parts of the writ. We shall then obtain a description of the particular kinds of property covered by it, and an insight into the various duties of the sheriff in connection therewith.

The most material direction contained in the writ is, "that of the goods and chattels of C. D. in your bailiwick you cause to be made." There are many kinds of property which are now covered by the phrase "goods and chattels;" we should, therefore, ascertain its meaning with precision.

Execution at common law.

At common law, the only writs available to a judgment creditor were *levari facias* and *fieri facias* (*o*). To these

(*n*) *Bolton* v. *Bolton*, 3 Ch. D. 276.
(*o*) See note to Bac. Abr. tit. Execution (C), "Of the *fi. fa.* and *lev. fa.*"

were, by statute, added the *capias* and the *elegit* (*p*). The *capias ad satisfaciendum* was a personal remedy, and applied to a civil action a procedure originally known only in criminal or semi-criminal matters, such as trespass, in the Court of King's Bench. The *elegit* was invented to seize the rents and profits of land. Before the Statute Westminster II., by which the last-named writ was given, nothing could be taken to satisfy a judgment for money, save what by the common law was capable of being sold. Nothing, then, can be taken in execution, under a writ of *fieri facias*, that cannot be sold (*q*). This rule still remains, except so far as it has been modified by the Act of 1 & 2 Vict. c. 110 (*q*), whereby certain kinds of property were made subject to the writ, and methods of disposition thereof provided. There were, at common law, two descriptions of property which could be sold, firstly, things of which the ownership could be transferred by their delivery, and, secondly, terms of years in land, otherwise or commonly called chattel interests in land. At the present time, therefore, the phrase "goods and chattels" comprises:—(1) chattels strictly so called; (2) terms of years in land; (3) certain miscellaneous property, mostly made subject to the writ by statute.

When *fi. fa.* applicable: first principle.

Nothing can be taken but what can be sold.

Meaning of phrase in writ, "goods and chattels."

Sub-sect. (i).—*Goods and Chattels.*

The judgment being an authentication of the debt, has no effect of itself over the property of the debtor, though it decides the right or title of the successful party to so much property, without specifying whose is the property, in any particular thing (*r*). But at common law, the

Effect of judgment and writ over goods at common law.

(*p*) Gilb. Execution, *passim*.

(*q*) *Francis* v. *Nash*, Ca. t. Hard. 53; *Legg* v. *Evans*, 6 M. & W. 36, p. 41; Wats. Sher. 249.

(*r*) *Fleetwood's case*, 8 Rep. 171 a. It is usually said that the judgment bound the lands of the debtor, but not his goods. The true significance of this somewhat inexact statement will appear when we proceed to the discussion of the writ of *elegit*.

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defendant's goods, though not affected by the judgment, were bound from the date of the *teste* of the *fi. fa.* (*s*), and might be taken in execution by the sheriff, in the hands even of a person who had *bonâ fide* purchased them since that date. The meaning of the expression, that the property of the goods is "bound," is, not that the property in them is altered, but that the defendant, from the date of the *teste*, cannot dispose of them, unless in market overt, so as to prevent their being taken in execution (*t*). This state of the law was first modified by sect. 16 of 29 Car. II. c. 3, whereby;—"No writ of *fieri facias* or other writ of execution shall bind the property in the goods of the debtor against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners to be executed; and for the better manifestation of the said time, the sheriff, under-sheriff and coroners, their deputies and agents, shall, upon the receipt of any such writ (without fee for doing the same), indorse upon the back thereof the day of the month or year whereon he or they received the same."

Goods "bound" by the writ.

Statute of Frauds, s. 16.

This section has been construed to apply for the benefit of purchasers and creditors only (*u*). The law upon this point was again modified by sect. 1 of the Mercantile Law Amendment Act, 1856, which we shall, in due course, proceed to explain: but to confine our present remarks to

Construction placed upon the section.

(*s*) The goods were "attendant to answer the execution," the reason given for the goods being bound. Gilb. Execution, 13 *et seq.* The extent to which goods are bound by *fieri facias* is discussed *Payne* v. *Drewe*, 4 East, 523.

(*t*) 1 Saund. 219 g, note (*t*). Note to *Lillingston's case*, 7 Rep. 39 a; Tidd's Pr. 1000.

(*u*) *Horton* v. *Ruesby*, Comb. 33, where Sir G. Treby (*ut amicus curiæ*) said, "he was present at the making of the said statute, and that was the intention of the parliament"!! *S. C.*, apparently, 2 Show. 485; *Anon.*, 2 Vent. 218. The reason for this construction of the statute is nowhere given, but might well be justified by the words of the section: "No writ, etc., shall bind the *property*, etc." No question of *property* can arise as between judgment creditor and judgment debtor.

the Statute of Frauds, a purchaser might safely buy, or a creditor might put an execution upon, goods, so long as no writ was actually *delivered to the sheriff* to be executed (*v*). It follows that, so far as this enactment is concerned, the writ of *fi. fa.* is, as between the parties to the judgment, of the same effect as at common law. One practical conclusion stated to have been drawn from this is, that the section does not interfere with the right of a plaintiff's personal representatives to proceed with the execution, notwithstanding his death after the *teste* but before the delivery of the writ to the sheriff; nor with the plaintiff's right to proceed in case of the defendant's death at a like period (*x*). These two cases have already been discussed, and are subject, as we have observed, to the present rules of practice (*y*).

Effect of section on right of executors to proceed.

This construction of the statute is certainly available at the present time in any case where the debtor makes a gift of his goods and chattels after the date of the *teste* and before actual execution. That is to say, the protection given by the statute would not be afforded to a donee claiming without having given valuable consideration (*z*).

Present application of statute where claimant is donee merely.

Under the present practice, the time of the actual seizure by virtue of the writ is, so far as purchasers (*a*) are concerned, the crucial point; for by 19 & 20 Vict. c. 97, s. 1, —"No writ of *fieri facias* or other writ of execution, and no writ of attachment (*b*) against the goods of a debtor, shall prejudice the title to such goods acquired by any person

Merc. Law Amendment Act, 1856, s. 1.

(*v*) See note (*u*), *supra*.

(*x*) *Waghorne* v. *Langmead*, 1 Bos. & P. 571; and note, for authorities, *Farrer* v. *Brooks*, 1 Mod. 188. The old authorities seem all to depend upon the rule that the writ of execution of a judgment in vacation was *tested* of the preceding term. See cases already referred to, and *Odes* v. *Woodward*, 2 Ld. Raym. 850; *White* v. *Hayward*, 2 Ves. Sen. 461.

(*y*) *Vide supra*, Chap. I. s. 2, sub-s. (iii), and note (*u*) preceding page.

(*z*) See for an example, though before the statute, *Boucher* v. *Wiseman*, Cro. Eliz. 440.

(*a*) Note that the enactment does not extend to creditors other than the creditor pursuing the execution.

(*b*) The meaning of this phrase as used in this statute is not clear.

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bonâ fide and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ; provided that such person had not, at the time when he acquired such title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, under-sheriff, or coroner."

Effect of section on title to goods.

This section further protects the buyer's title to goods. Before it was passed, that title depended upon whether a writ of execution over goods against the seller had been delivered to the sheriff (*c*). Now, the buyer has a good title, unless the goods have been actually seized before the sale. If, however, he has notice that a writ has been delivered to the sheriff, he is not safe in buying, for the common law principle, as modified by the Statute of Frauds, remains. Notice that a writ has been issued merely, without notice that it has been delivered to the sheriff to be executed, will not affect a purchaser.

The notice that writ in sheriff's hands.

It may be remarked that, but for these two enactments of the Statute of Frauds and the Mercantile Law Amendment Act, in favour of purchasers, a satisfactory title to goods which had been once subjected to an execution could be given only where an actual sale under the writ itself had taken place.

Writ *to be executed.*

It must be borne in mind—a point often of importance between creditors having competing writs of *fi. fa.*—that in order for the 16th section of the Statute of Frauds to have any application, the writ must be in the sheriff's hands *to be executed* (*d*).

No application to terms of years.

From the wording of sect. 16 of Stat. of Frauds, and of sect. 1 of the M. L. A. Act, 1856, it would appear that their provisions have no reference to leasehold interests in land; and, on principle, the doctrine that the writ binds

(*c*) *Williams* v. *Smith*, 26 L. J. Ex. 371. Affirmed, 28 L. J. Ex. 286.

(*d*) *Smallcomb* v. *Cross*, 1 Ld. Raym. 251, Holt, C. J.; *Hunt* v. *Hooper*, 12 M. & W. 664.

the goods from the date of the *teste*, has reference only to goods and chattels (*bona et catalla*) strictly so called (*e*).

Priority of writs of *fi. fa*

The 16th section of the Statute of Frauds fixes the priority which is to be given to several writs of *fi. fa.* issued against the same execution debtor.

The sheriff is equally bound to execute all writs against the same execution debtor, giving priority to each in the order in which it comes into his hands (*f*).

This is the case, of course, where every writ is delivered to him to be executed, for the Statute of Frauds prevents any writ not so delivered from affecting the goods (*g*).

Effect of *teste*

The *teste* of the writ has, as regards competing creditors, no effect (*h*), so that where a writ, *tested* the 25th November, was delivered to the sheriff on the same day, and a writ, *tested* the 23rd November, was delivered to him on the 27th, the former was held entitled to priority (*i*). Where the sheriff has in his hands several writs for execution, it is immaterial under which of them the seizure is made, and when he sells, he sells in point of law under all the writs (*k*), and, therefore, must apply the proceeds as we have stated.

Seizure and sale, under which of several writs.

It would appear that any fraction of a day is sufficient to determine the priority (*l*), though where the sheriff had delivered to him a number of writs in a bundle, he was

(*e*) See *Bullock* v. *Dobbs*, 2 B. & Ald. 258, p. 272, for a learned discussion as to the meaning of the term.

(*f*) *Dennis* v. *Whetham*, L. R. 9 Q. B. 345.

(*g*) And, therefore, where the sheriff is directed not to execute till a certain day, a second writ, delivered into his hands before that day, must be executed first. *Kempland* v. *Macauley*, Peake, 65; *Hunt* v. *Hooper*, 12 M. & W. 664. The same is the case where the direction to the sheriff is not to execute till another execution comes in. *Pringle* v. *Isaac*, 11 Price, 445.

(*h*) Unless, it is suggested, several writs are delivered simultaneously into the sheriff's hands to be executed.

(*i*) *Hutchinson* v. *Johnston*, 1 T. R. 729; *Sawle* v. *Paynter*, 1 Dowl. & R. 307.

(*k*) *Jones* v. *Atherton*, 7 Taunt. 56; 2 Marsh. 375; *Drewe* v. *Lainson*, 11 Ad. & El. 529; 3 P. & Dav. 245; 1 Saund. 219 g.

(*l*) See next note, and, specially, *Smallcomb* v. *Buckingham*, Carth. 419, an instructive case.

held not to be entitled to a rule to compel the plaintiff's attorney to direct in what order of priority they were to be executed, as he could presumably make a true return, showing that he had fulfilled his duty (*m*).

The question of priority becomes of special importance where the writ first delivered to the sheriff is fraudulent or irregular. For example, where it is void under the statute 13 Eliz. c. 5; for there the sheriff is, subject to his having notice, bound to disregard the former writ and sell under the later (*n*).

Effect of delivery to sheriff "binding" goods.

The fact that the delivery of the writ to the sheriff to be executed binds the goods, does not go so far as to affect the title of a purchaser. When, therefore, a sale is made under a second writ, the purchaser acquires a good title, and if the proceeds are paid over to the person pursuing that writ, the remedy of the first execution creditor, who, as we have seen, is entitled to priority, is against the sheriff only. And further, the sheriff is, apparently, not entitled to pay over the proceeds to the first creditor, and return *nulla bona* to the second writ (*o*). This, however, would appear to be doubtful, considering the view taken of the sheriff's duty in the cases we have above quoted (*p*).

Delivery to be executed constitutes no charge.

The delivery of the writ to the sheriff to be executed gives the execution creditor no charge over the goods, so as to make him a secured creditor within the meaning of the Bankruptcy Act (*q*). All that is given to the sheriff is a mere right to seize, if and when the goods are found within his bailiwick. There is nothing, therefore, illegal in

(*m*) *Ashworth* v. *The Earl of Uxbridge*, 2 Dowl. N. S. 377. See note (*h*) preceding page. The sheriff could, under such circumstances, obtain relief by interpleading.

(*n*) See this subject discussed *infra*, p. 147.

(*o*) *Smallcomb* v. *Buckingham*, Carth. 419; *Rybot* v. *Peckham*, 1 T. R. p. 731, note.

(*p*) *Jones* v. *Atherton*, 7 Taunt. 58; 2 Marsh. 375; *Drewe* v. *Lainson*, 11 Ad. & El. 529; 3 P. & Dav. 245. *Supra*, p. 117. See Patteson, J., in *Giles* v. *Grover*, 1 Cl. & F. 72, p. 74.

(*q*) *Ex parte Williams*, *Re Davies*, L. R. 7 Ch. 314; *Ex parte Nelson*, *Re Hoare*, 14 Ch. D. 41.

the debtor removing the goods into another bailiwick before they are actually seized (*r*). There must be actual seizure before any right over goods is acquired (*s*).

Duty of sheriff to seize.

With reference to this kind of property, the sheriff's duty is, that immediately the writ of *fi. fa.* is delivered to him *to be executed*, he must forthwith seize, in his bailiwick, such quantity of the goods and chattels of the debtor as would be reasonably sufficient to pay the amount indorsed on the writ (*t*). This is subject to the exception, that the wearing apparel and bedding of any judgment debtor or his family, and the tools and implements of his trade, to the value in the whole of five pounds, are not liable to seizure under execution (*u*).

The seizure is effected by a bailiff or sheriff's officer taking actual possession. He acts by virtue of a warrant, addressed to him in the usual manner. It is essential that the officer should take actual possession of the goods, and he must, therefore, enter the place where they are, for otherwise there would be no transfer of possession to him.

Test whether seizure made.

Whether or not seizure has been made, depends upon the acts and intention of the officer, and is a question of pure fact (*x*). It is not necessary for the sheriff's officer to lay his hand on a single article, and if he, being present at the place where the goods are, says, "I seize everything on this holding," enough is done to constitute a seizure of the whole, whatever the extent of the place or holding may

(*r*) *Ex parte Williams, supra*, last note; though what would have been the effect of his so doing, prior to the Statute of Frauds, might form an interesting antiquarian point for discussion.

(*s*) See *Backhouse* v. *Siddle*, 38 L. T. N. S. 487.

(*t*) *Gawler* v. *Chaplin*, 18 L. J. Ex. 42; 2 Exch. 503. The common law "attached but little importance to the possession of a chattel," the signing of judgment, and *teste* of the writ, being the crucial points. See Martin, B., in *Gladstone* v. *Padwick*, L. R. 6 Ex. 203, p. 210.

(*u*) 8 & 9 Vict. c. 127, s. 8.

(*x*) *Bird* v. *Bass*, 6 M. & Gr. 143; and see specially the form of the second question left to the jury. *Balls* v. *Thick*, 9 Jur. 304. In cases of distress, see the weight given to the intention of the landlord's agent for the purpose, *Swann* v. *Earl of Falmouth*, 8 B. & C. 456.

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Insufficient seizure.

be (*y*). Where the sheriff's officer, however, simply laid his hand on a table, saying "I take this table," then locked up the warrant in the table drawer, and went away without leaving anyone in possession, it was held, that whether he had or not taken sufficient possession, he had relinquished it; the mere expression of intention, not followed by actual possession, was insufficient (*z*). It has been said, that the true test of whether a seizure has been made is: supposing the sheriff had not the authority of the Court, could an action of trespass be brought against him (*a*).

Retaining possession.

The officer must retain possession of the goods after seizure. If he relinquishes or abandons possession, he does so at the sheriff's risk of an action for negligence (*b*).

Effect of abandonment by sheriff on goods themselves.

As to the goods themselves, it is submitted that, on strict reasoning, whether the sheriff abandons the possession or not, they remain bound. The Statute of Frauds and the M. L. A. Act, 1854, do not abolish the effect of a writ of execution, but modify it only, so that it binds the goods from delivery to the sheriff or actual seizure only. As expressed in a recent case, where purchasers were not in question, the issue of a writ of execution gives a specific claim to the goods of the judgment debtor (*c*).

Removal of goods for safety.

The sheriff may remove (*d*) the goods for safe custody, and for his own protection should do so where there is risk of their being injured or rescued (*e*). It is usually,

(*y*) *Gladstone* v. *Padwick*, L. R. 6 Ex. 203, a case on the words "actual seizure" contained in the first section of the M. L. A. Act, above quoted. See *Cole* v. *Davies*, 1 Ld. Raym. 724; *Nash* v. *Dickenson*, L. R. 2 C. P. 252.

(*z*) *Blades* v. *Arundale*, 1 M. & S. 711.

(*a*) Bramwell, B., in *Mortimore* v. *Cragg*, 3 C. P. D. p. 219. See *Andrews* v. *Saunderson*, 1 H. & N. 725, p. 728.

(*b*) *Blades* v. *Arundale*, 1 M. & S. 711. The abandonment must be a real abandonment, not a mere temporary absence. *Ackland* v. *Paynter*, 8 Price, p. 99, per Garrow, B.

(*c*) *Re Evans*, *Evans* v. *Evans*, 34 Ch. D. 597.

(*d*) This is subject to the protection given to landlords for recovery of their rent, *vide infra*, sub-s. vi. of this section.

(*e*) Atkins, Sher. 229; Ch. Arch. Pr. 838.

however, a saving of expense, for the officer to continue in possession in the place where the goods are. The judgment debtor, as a rule, does not object to this course, although, perhaps, he could do so (*f*).

Nature and effect of sheriff's possession.

The effect of the sheriff's possession under this writ deserves consideration. It has been thus described by the late Lord Chief Justice Cockburn:—"I think it is a fallacy, however usual it may be in common parlance, to say that the goods are in the possession of the sheriff at all. They are in the custody of the law, and of the sheriff's officer as representing the law; *possession*, undoubtedly, as against a wrongdoer, who might seek to divest him of any portion of the goods so seized; but I think *custody* only so far as the real owner of the goods is concerned. Until these goods are sold under the authority of the law, virtually they are in his possession (*g*); at all events, as regards everyone but the execution creditor, or the officer of the law who, under the writ of *fi. fa.*, is entitled to the custody of the goods" (*h*). Whatever may be thought of the language in which this is expressed, and the fine distinction drawn between custody and possession, the position of the sheriff can be, to some extent, ascertained from it. The actual decision in the case was that an execution debtor could sell the goods seized under the *fi. fa.*, and, subject thereto, could make a valid delivery of them to the purchaser (*i*). It is clear that the seizure does not change the property in the goods, that is to say, they remain the judgment debtor's until they are sold by the sheriff under the writ (*k*). At

Distinction between custody and possession.

(*f*) See *Ash* v. *Dawnay*, 22 L. J. Ex. 59.

(*g*) "His," meaning apparently the "real owner's."

(*h*) *Union Bank of London* v. *Lenanton*, 47 L. J. Q. B. 409; see *Giles* v. *Grover*, 1 Cl. & Fin. at p. 77. Compare with this language that of Martin, B., in *Gladstone* v. *Padwick*, L. R. 6 Ex. 203, p. 210, above referred to; *Woodland* v. *Fuller*, 11 A. & E. 859.

(*i*) It may be questioned whether the dictum of Cockburn, L. C. J., was necessary to the decision.

(*k*) Authorities summarized by Patteson, J., in *Giles* v. *Grover*, 1 Cl. & Fin. pp. 76, 77.

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Sheriff's right of action for damage to goods.

the same time, the sheriff can maintain an action in respect of any damage done to the goods which have been seized. In the older cases this is put on the ground that the sheriff acquires, by the fact of the seizure, a "special property" in the goods (*l*), but it is submitted that on principle it is a fallacy to say that he acquires any interest under the writ, in the goods themselves, though it places him in a position to bring personal actions for damages done to them (*m*).

Effect of possession of sheriff.

Although the sheriff acquires no property in the goods, for they become in no sense his, and although, according to the statement of his position to which we have referred, he is alleged in one sense not to take possession of them (*n*), the change of fact and circumstance, which necessarily takes place by the seizure and holding by the officer, has some particular effects of its own. For example, goods so seized are, by the fact of such seizure, taken out of the "apparent possession" of the owner within the meaning given to that artistic phrase by the 4th section of the Bills of Sale Act, 1878 (*o*). Again, where the sheriff takes possession of goods belonging to the judgment debtor, they cease to be in his possession, order, or disposition, within the meaning of section 44 of the Bankruptcy Act, 1883 (*p*). If, however, the goods seized were not the property of the judgment debtor, and therefore, with respect to them, the

As to "apparent possession."

As to "order and disposition."

(*l*) *Wilbraham* v. *Snow*, 2 Saund. 47a, in the notes to which will be found the old leaning on the matter.

(*m*) See Patteson, J., in *Giles* v. *Grover*, 1 Cl. & F. 72, p. 74 *et seq.* The action is based really upon an injury to the sheriff's possession. The form of action was either trespass or trover, see 2 Saund. 47a (1). He could not maintain trespass unless he was, or had been, in actual possession, notwithstanding the "binding" of the goods from the date of the teste. See, for an example, *Blades* v. *Arundale*, 1 M. & S. 711 (though after Statute of Frauds).

(*n*) "Does the sheriff's possession divest the possession of the owner? I should think not." Cockburn, L. C. J., 47 L. J. Q. B. p. 411.

(*o*) 41 & 42 Vict. c. 31. *Ex parte Saffery, Re Brenner*, 16 Ch. D. 668.

(*p*) 46 & 47 Vict. c. 52. *Ex parte Foss, Re Baldwin*, 2 De G. & J. 230.

possession of the sheriff was merely wrongful, the like result does not follow, that is, the goods remain in the debtor's order and disposition, notwithstanding the seizure (*q*).

Effect of seizure and possession as regards discharging the debtor.

Another alleged effect of the seizure is described as follows:—"As soon as the sheriff seizes the debtor's goods under the writ, he is thereby absolutely discharged to the extent of the levy, whether the sheriff sells the goods or returns the writ or not" (*r*). The accuracy of this somewhat ambiguous statement, in whatever sense it may be read, is questionable. It is submitted that the debtor is not discharged by the seizure at all, but by, and to the extent of, the levy, that is to say, to the extent of the sum realised by the execution (*s*). Where the *fi. fa.* is duly executed, and the money levied by the sheriff, it is a complete discharge to the debtor whether the money gets to the creditor or not (*t*). There is also authority for the statement which we have quoted, that when the sheriff *seizes* the goods by virtue of the writ, the defendant is actually discharged (*u*); but, on principle, this seems to be doubtful, for the goods remain the property of the judgment debtor until they are sold, notwithstanding the seizure, and the levy is not completed until the sale (*x*). In the case where the sheriff returns that he has the goods in his hands, where they remain for want of buyers, and also returns the value of the goods, the return is, perhaps,

(*q*) *Barrow* v. *Bell*, 25 L. J. Q. B. 2; *Ex parte Lamb*, 14 W. R. 112; *Ex parte Edey, Re Cuthbertson*, L. R. 19 Eq. 264.

(*r*) Ch. Arch. Pr. 869, and authorities. The principle was stated by Campbell, *arguendo*, "an execution must be deemed a satisfaction of the debt until the contrary appears." *Green* v. *Elgie*, 3 B. & Ad. 437; 1 Dowl. 344.

(*s*) See definition of word "levy," Sweet's Law Lexicon; *Drewe* v. *Lainson*, 11 Ad. & El. 529.

(*t*) *Perkinson* v. *Gilford*, Cro. Car. 539; *Taylor* v. *Baker*, 2 Mod. 214; Holt, *arguendo*.

(*u*) *Clerk* v. *Withers*, 6 Mod. 299. See report in 2 Ld. Raym. 1072; Bac. Abr. tit. Execution (D.).

(*x*) See Tidd's Practice, 1019; Wats. Sher. 273.

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a discharge *pro tanto*, for the reason that it is said the sheriff must find buyers at the appraised value (*y*).

Sheriff's duty to sell.

It is the duty of the sheriff to sell the goods, if the judgment debtor do not at once satisfy the creditor (*z*). If the sheriff do not perform, or delay in the performance of, this duty, an action will lie against him, and the action will lie at the suit both of the plaintiff (*a*) and of the defendant (*b*). The sheriff cannot sell the goods without first seizing them (*c*). The sheriff cannot retain the goods and pay the plaintiff (*d*), nor can he deliver the goods to the plaintiff in satisfaction of his claim, without being liable to an action by the defendant (*e*). If the sheriff is guilty of negligence in selling, for instance, at an undervalue (*a*), he is, of course, liable on the general principles we have already discussed. He is also liable if he sells more than enough to satisfy the writ (*g*).

Mode of selling.

The manner and mode of sale was, until recent years, entirely in the discretion of the sheriff, that is, he could enter into what contracts of sale he pleased respecting goods and chattels seized. By the Bankruptcy Act of 1861 (*h*), a regulation was introduced, whereby every sale of goods under an execution for a sum exceeding 50*l*., must have been by public auction. This section was not renewed in the Bankruptcy Act, 1869, but under sect. 145 of the present Act (*i*),—"Where the sheriff sells the goods of a debtor under an execution for a sum exceeding 20*l*.

Bankruptcy Act, 1883, s. 145.

(*y*) *Vide infra*, p. 410, n. (*p*); *R.* v. *Bird*, 2 Show. 87.

(*z*) Tidd's Practice, 1013; 1 Vent. 7.

(*a*) *Keightley* v. *Birch*, 3 Camp. 521; *Mullett* v. *Challis*, 20 L. J. Q. B. 161.

(*b*) *Carlile* v. *Parkins*, 3 Stark. 163.

(*c*) *Ex parte Hall*, *Re Townsend*, 14 Ch. D. 132. But *vide infra*, p. 126, as to ships.

(*d*) *Waller* v. *Weedale*, Noy. 107.

(*e*) *Thompson* v. *Clerk*, Cro. Eliz. 504.

(*g*) *Aldred* v. *Constable*, 6 Q. B. 370. He must stop the sale, so soon as sufficient to satisfy the execution has been obtained. *Cook* v. *Palmer*, 6 B. & C. 739; *Batchelor* v. *Vyse*, 4 Moo. & Sc. 552.

(*h*) 24 & 25 Vict. c. 134, s. 74.

(*i*) 46 & 47 Vict. c. 52.

(including legal incidental expenses), the sale shall, unless the Court from which the process issued otherwise orders, be made by public auction, and not by bill of sale or private contract, and shall be publicly advertised by the sheriff on and during three days next preceding the day of sale."

Farming stock.

The seizure and sale of farming stock in execution, is regulated by statute, the short effect of which is to restrain altogether the sale of straw, manure, or turnips, for the purpose of being carried off the farm, and to subject all hay, grass, or roots, the produce of the land, to the terms of any agreement between landlord and tenant, with respect thereto. Further regulations are made as to the landlord's interest, and his right of distress (*k*).

Title under sale by sheriff.

The sale by the sheriff gives an indefeasible title to any purchaser (*l*). But this statement must be taken with the limitation that a sale by a sheriff is not a sale in *market overt*, and therefore gives absolute title to such goods only as were the defendant's (*m*). The title depends not upon the judgment, but upon the sale under the writ. For if the judgment be set aside or reversed subsequently to the sale, the property in the goods will have passed (*n*). It is submitted, therefore, that where a sale by the sheriff is made without complying with the formalities of the above enactments, such sale would be good (*o*). For example, if the sheriff had advertised for two days only, and then sold, it would be idle to contend that the property in the goods did not pass. The sheriff would, of course, be responsible for any damage which might have occurred in consequence

(*k*) 56 Geo. 3, c. 50. Lush Pr. 606.

(*l*) 5 Rep. 90 b. *Hernaman* v. *Bowker*, 11 Ex. 760. See *Doe* d. *Stevens* v. *Donston*, 1 B. & Ald. 230. The purchaser here includes the plaintiff and a trustee for him. *Stratford* v. *Twynam*, Jac. 418; *Leader* v. *Danvers*, 1 Bos. & P. 359.

(*m*) That is, such goods as the sheriff is by the writ directed to sell. See *Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. & N. 502.

(*n*) *Hoe's Case*, 5 Rep. 90 a. See *Doe* d. *Emmett* v. *Thorn*, 1 M. & S. 425.

(*o*) See for a case of some irregularity, *Wright* v. *Child*, L. R. 1 Ex. 358.

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of the informality. It may be mentioned, that an execution creditor may apply to the Court, *ex parte*, for leave to sell by private contract (*p*).

Receiver in lieu of sale.

Where there is a dispute as to the property in the goods seized, and irrevocable injury might be done if the sheriff sold, a receiver will be appointed, pending the trial, on interpleader of the question whose the goods are, and the sheriff released from responsibility in the matter (*q*).

Again, in cases where there has been a seizure by the sheriff, and an appointment of a receiver for other purposes than execution, there may be circumstances under which parties may come to the Court and ask for such an order as may equitably work out the rights of the parties (*r*).

Execution against ships, and shares in ships.

A ship is a chattel, and may be taken in execution under a *fi. fa.* A share in a ship may also be taken just as a share in any other chattel. When a ship is a British ship it must be registered under the Merchant Shipping Act, 1854 (*s*), and must be transferred, and any share therein must be transferred, by bill of sale (*t*). This registration is not necessary where a ship is not a British ship, for instance, where it has been built in a British yard for sale to a foreigner. A sale of such a ship may, therefore, be made by delivery, without the necessity for any bill of sale, just as in the case of any other chattel (*u*). When, however, the ship is once registered, once a British ship, the only legal method of transferring it, or any share in it, is by bill of sale, as required by the Act to which we have referred (*x*). These statutory provisions affect, to a

(*p*) *Hunt* v. *Fensham*, 12 Q. B. D. 162. There appears to be no provisions for the sheriff's charges, at any rate, of appraisement, even in case the necessary order of the Court is obtained. *Phillips* v. *Viscount Canterbury*, 11 M. &. W. 619; Ch. Arch. 36, 1701.

(*q*) *Howell* v. *Dawson*, 13 Q. B. D. 67.

(*r*) See dictum of Kindersley, V.-C., in *Defries* v. *Creed*, 34 L. J. Ch. 607.

(*s*) 17 & 18 Vict. c. 104, s. 19.

(*t*) Sect. 55.

(*u*) *Union Bank* v. *Lenanton*, 3 C. P. D. 243.

(*x*) *Liverpool Borough Bank* v. *Turner*, 1 Johns. & H. 159; affirmed 2 De G. F. & J. 502.

considerable degree, the seizure and sale in execution of ships and shares in ships.

Ship seizable under *fi. fa.*

When a ship belonging to the execution debtor, that is, of which he is sole owner, is within the bailiwick of the sheriff, it is clear, without referring to authority, that he can, under a writ of *fi. fa.*, seize the ship and sell it by the only legal method of transfer, a bill of sale (*y*). It does not appear, however, to be absolutely necessary that the sheriff should seize at all, because actual delivery of the ship to a purchaser on a sale is not essential to the transfer of the property therein (*z*), in the same way that the sale of a share in a ship has always been held to be good without actual delivery (*a*).

Seizure unnecessary.

Practice pursued in *Harley* v. *Harley*.

The practice on executing a writ of *fieri facias* against a share in a ship, was discussed in the case of *Harley* v. *Harley* (*b*). In that case the following course was pursued:—At the time the writ was delivered into the sheriff's hands to be executed, the ships in which the execution debtor had shares were not in port, but when they came in the solicitors for the execution creditor obtained, by the direction and authority of the sheriff, the certificate of registry of each vessel as it came in. The sheriff made no formal seizure, but the certificates were retained by him until after the sale, when they were returned to the other part-owners of the ship (*c*). From the certificates thus in the sheriff's hands, the number of shares to which the execution debtor was entitled appeared, and of those shares the sheriff obtained himself to be registered as owner (*d*).

(*y*) Except, as we have remarked, where it is not a British ship, in which case he sells it just as he sells any other chattel. *Union Bank of London* v. *Lenanton*, 3 C. P. D. 243.

(*z*) *Harley* v. *Harley*, 11 Ir. Ch. R. 451. Where the case of execution against a ship was taken as analogous to that against a term of years, *vide infra*, p. 128.

(*a*) *Addis* v. *Baker*, 1 Anstr. 222.

(*b*) 11 Ir. Ch. R. 451.

(*c*) This procedure seems questionable. *Vide* sect. 50 of 17 & 18 Vict. c. 104.

(*d*) This seems, it is submitted, to be a method of legal transfer other than by bill of sale; and to be not expressly provided for by the Merchant Shipping Acts. See sect. 58 of 17 & 18 Vict. c. 104.

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He then, by bill of sale, sold the shares to the purchaser, and the whole transaction was held to be a good sale, notwithstanding that no seizure had been made.

Ship at sea.

The case above referred to having decided that seizure by the sheriff is not necessary, it would appear that a *fi. fa.* may be enforced against a ship which is at sea, and if the sheriff can thus obtain himself to be registered as owner of the shares of the execution debtor, he can transfer those shares, by bill of sale, in the same way as any other owner (*e*).

Ship away from port of registry.

It is, however, submitted that although the ship is liable to execution, the same course as that pursued in *Harley* v. *Harley* could not be taken, so long as the ship was away from her port of registry, without infringing the provisions of sect. 50 of the Merchant Shipping Act, 1854 (*f*).

Ship or share mortgaged not liable under *fi. fa.*

Where the ship, or the share in a ship, is mortgaged, a judgment creditor of the mortgagor cannot take her in execution under a *fi. fa.* (*g*). The proper course, it is submitted, would, in such case, be to apply for a receiver (*h*).

Property of debtor to be taken only.

The general principle that the execution creditor can take only the property of the execution debtor in execution, applies as much to ships as to other property. He cannot, therefore, interfere with the rights of any person having a mortgage or charge before the date of the execution (*i*).

Sub-sect. (ii).—*Terms of Years.*

Terms of years.

The sheriff must, under this writ, sell the defendant's chattel interests in land, where those interests are legal. Execution against equitable estates in a term of years is

(*e*) The right to inspect the register is given by sect. 92 of 17 & 18 Vict. c. 104.

(*f*) 17 & 18 Vict. c. 104.

(*g*) *Dickinson* v. *Kitchen*, 8 E. & B. 789.

(*h*) Execution, by means of appointment of receivers, is discussed, *infra*, Book III. Chapter I. Sect. 3.

(*i*) *Langton* v. *Horton*, 1 Hare, 549.

discussed in the subsequent chapter on *elegit*, it having been decided that such an estate cannot, even since the 10th section of the Statute of Frauds, be taken by the sheriff under a *fi. fa.* (*k*).

No seizure necessary or enforceable.

It is not necessary for the sheriff to seize the lease or enter on the lands; and it is sufficient for the sheriff, he having acquired a power of sale by the delivery of the *fi. fa.*, to execute an assignment without any seizure whatever (*l*). The usual practice, as appears by the cases referred to in the last note, seems to have been that the lease itself should be seized, and then the term sold. The mandate in this writ does not justify the sheriff in turning out the defendant from his possession, and putting the purchaser in (*m*). The sheriff or under-sheriff (*n*) executes an assignment of the term under his seal of office (*o*), and in his name, to the purchaser, who can then either enter peaceably (*p*), or bring his action of ejectment (*n*).

Mode of selling.

Execution over term under *fi. fa.* and *elegit* compared.

A term may be taken in execution, not only under the writ of *fi. fa.*, but also under an *elegit*, which latter method is, notwithstanding its cumbersomeness and expense, the preferable course in any case where the term of years is valuable (*q*). There are several objections to a sale under a *fi. fa.* In the first place, the assignment by the sheriff is almost of necessity an unsatisfactory document, for it

Objections to sale under *fi. fa.*

(*k*) *Scott* v. *Scholey*, 8 East, 467. *Vide infra*, p. 186.

(*l*) *Coleman* v. *Rawlinson*, 1 F. & F. 330; *Playfair* v. *Musgrove*, 14 M. & W. 239; 15 L. J. Ex. 26; *Harley* v. *Harley*, 11 Ir. Ch. R. 451, p. 465.

(*m*) *Rex* v. *Deane*, 2 Show. 85. See *Burden* v. *Kennedy*, 3 Atk. 739. The sheriff is not liable for the act of the purchaser of the term. *Taylor* v. *Cole*, 3 T. R. 292.

(*n*) *Doe* d. *James* v. *Brawn*, 5 B. & Ald. 243.

(*o*) The assignment must, by virtue of sect. 3 of 8 & 9 Vict. c. 106, be by deed. Before that statute, it must have been in writing to satisfy Statute of Frauds. *Doe* d. *Hughes* v. *Jones*, 9 M. & W. 372. A form will be found in the Appendix, *infra*, No. 34, p. 407.

(*p*) *Taylor* v. *Cole*, 3 T. R. 292.

(*q*) The single advantage, in favour of a sale under a *fieri facias*, seems to be that it cannot be upset by subsequent reversal of the judgment. *Doe* d. *Emmett* v. *Thorn*, 1 M. & S. 427, n.; *vide infra*, p. 186, and *Jeanes* v. *Wilkins*, 1 Ves. sen. 195; 5 Rep. 90 b.

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does not recite the term assigned (*s*). If the sheriff takes upon himself to recite the beginning and end of the term, and the recital is wrong, the assignment is void, there being no such term in existence (*t*). No sheriff would, therefore, run the risk of assigning certain limits to the term; and as all leasehold interests (*u*) are comprised in the description chattel interests in land, the very uncertainty of what the sheriff is selling depreciates the property. It would appear, also, that a defendant can evade an execution by *fi. fa.* against his term of years at any time before actual sale by the sheriff. The sheriff makes no seizure of the term, or entry on the land, which cannot, therefore, be said to have been at any time (until sale) delivered in execution within the terms of 27 & 28 Vict. c. 112, s. 1 (*x*); and the legal estate continues in the judgment debtor until sale thereof (*y*). If, therefore, the debtor sell to a *bonâ fide* purchaser without notice of the writ of execution, it would, it is submitted, be impossible to dispute his title (*z*).

Clause restraining assignment.

Where there is in a lease a clause avoiding it on its being taken in execution, it cannot, of course, be sold under a *fi. fa.* or any other writ, but a mere clause against assignment, without leave of the lessor, will not have this effect (*a*).

Rent-charge.

A rent-charge, or an annuity in the nature of a rent-charge, being assignable or "vendible" at common law, can, like a chattel interest, be sold under a *fi. fa.* (*b*).

Estate *pur auter vie.*

It seems to be admitted that since the Statute of

(*s*) See the form which the assignment had evidently taken in *Taylor* v. *Cole*, 3 T. R. 292; and Appendix, *infra*, Form No. 34.

(*t*) *Palmer's case*, 4 Rep. 74a; Cart. 155. An inquisition under an *elegit*, which found a term merely without finding what the term was, would be informal.

(*u*) A tenancy from year to year for example. *Doe* d. *Westmoreland* v. *Smith*, 1 Man. & Ry. 137.

(*x*) See the effect of judgments upon land, and the questions arising under this statute, discussed *infra*, pp. 189, 300, 307.

(*y*) *Doe* d. *Hughes* v. *Jones*, 9 M. & W. 372.

(*z*) In the same way as an equitable estate. 2 Cru. Dig. 53, s. 68.

(*a*) *Doe* d. *Mitchinson* v. *Carter*, 8 T. R. 57.

(*b*) *York* v. *Twine*, Cro. Jac. 78; Com. Dig. Execution, C. 4.

Frauds (*c*), the sheriff may sell an estate *pur auter vie* under a *fi. fa.* (*d*), though he cannot an estate of pure freehold as for life.

The writ of *fieri facias* does not lie for anything which cannot be delivered in execution, nor for an interest in land or rents for which ejectment does not lie. A canonry could not, therefore, be affected or reached by it (*e*).

Sub-sect. (iii).—*Other Property seizable under a Fi. Fa.*

Besides goods and chattels, and chattel interests in land, other kinds of property are, by 1 & 2 Vict. c. 110, s. 12, made subject to the writ of *fi. fa.* The usual procedure of sale by the sheriff is necessarily replaced by other modes of disposition. It is, therefore, advisable to set forth the section at length. The section enacts,—"That by virtue of any writ of *fi. fa.* to be sued out of any superior or inferior Court, . . . or any precept in pursuance thereof, the sheriff or other officer having the execution thereof may, and shall, seize and take any money or bank notes (*f*) . . . and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, belonging to the person against whose effects such writ of *fi. fa.* shall be sued out, and may and shall pay or deliver to the party suing out such execution any money or bank notes which shall be so seized, or a sufficient part thereof; and may and shall hold any such cheques," &c., "as a security or securities for the amount by such writ of *fi. fa.* directed to be levied, or so much thereof as shall not have been otherwise levied and raised; and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived, and that the payment to such sheriff or

1 & 2 Vict. c. 110, s. 12.

Money, bank notes, cheques, &c.

(*c*) 29 Car. 2, c. 3, s. 12.

(*d*) Note to *Johnson* v. *Streete*, Comb. 291; Bac. Abr. tit. Execution. Of the *Fieri Facias*.

(*e*) *Doe* d. *Butcher* v. *Musgrave*, 1 Man. & Gr. 625.

(*f*) As to money of the debtor in sheriff's hands, see *Armistead* v. *Philpot*, 1 Doug. 231. A strange reason is given for bank notes not being seizable, *Francis* v. *Nash*, Lee, Ca. temp. Hard. 53.

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other officer by the party liable on any such cheque, bill of exchange," &c., "with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery, and levy in execution, as the case may be, from his liability on any such cheque," &c.; "and such sheriff or other officer may, and shall, pay over to the party suing out such writ, the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied. And if, after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued: provided, that no such sheriff or other officer shall be bound to sue any party liable upon any such cheque," &c., "unless the party suing out such execution shall enter into a bond with two sufficient sureties for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action."

Effect of seizure on the property in notes, &c.

Where money, bank notes, &c. are seized under the writ, the effect is not to thereupon vest them in the person issuing execution any more than is the case where goods are seized. These particular proceeds of the execution are in the same position as the proceeds of goods seized and sold, and do not become the property of the creditor until appropriated to him by the sheriff (*g*).

Cheques, &c. to be held as security.

It will be observed that the section requires the sheriff to hold cheques, &c., as security for the amount directed to be levied. No further or other authority is given to any person than that stated expressly in the section itself.

(*g*) *Collingridge* v. *Paxton*, 21 L. J. C. P. 39; 11 C. B. 683. Bank notes do not, it is submitted, appear to be so far in the same position as proceeds of goods sold as to subject them to the provisions of sub-sect. (2), sect. 46, Bankruptcy Act, 1883.

And it is submitted to be questionable what, if any, other steps can be taken to realize or put in force the security given by it. This is of importance in the case of "specialties or other securities for money" (*h*). It seems to be a somewhat futile enactment, if the person pursuing the judgment gets by his execution no means of realization nor anything more than a mere lien. It appears to have been the view of Wilde, C. J., that, independently of this statute altogether, the sheriff's duty is to sell cheques and promissory notes; it is said they are chattels, and therefore saleable (*i*).

Specialties, or other securities for money.

In a recent case an opinion has been expressed, that the section applies only to bills and notes, and securities *ejusdem generis* as those expressly therein mentioned (*k*).

A policy of assurance on the debtor's life, or a policy which he holds on the life of any other person, may, however, be a security for money; it depends upon the form of the policy and the actual contract between the insured and the insurers (*l*). Where it is such a security, the sheriff may seize and hold it under this section (*m*).

Policies of assurance.

If the debtor holds a mere assignment of a debt or other legal chose in action, it is submitted that the sheriff cannot seize it. Such an assignment is, it is true, by virtue of subsect. 6 of sect. 25 of the Judicature Act, 1873, effectual so as under certain conditions to enable the assignee to sue, but the chose in action is not a security for money. The sum recoverable by the debtor under such an instrument is recoverable by his judgment creditor by means of

Assignment of debt, or chose in action.

(*h*) But see, as to these, *infra*, Chapter on "Equitable Execution"; 1 & 2 Vict. c. 110, s. 13.

(*i*) *Mutton* v. *Young*, 4 C. B. 373; authorities quoted in *Bullock* v. *Dobbs*, 2 B. & Ald. 258, for what is included in term *bona et catalla*. But cheques and promissory notes are negotiable, and may, perhaps, not be included in the strict definition. See *Rex* v. *Villers*, 8 Price, 587.

(*k*) *In re Rollason, Halse's claim*, 34 Ch. D. 495.

(*l*) *Law* v. *The London Indisputable Life Policy Co.*, 1 K. & J. 223.

(*m*) *Stokoe* v. *Cowan*, 30 L. J. Ch. 882. See, however, *Alleyne* v. *Darcy*, 5 Ir. Ch. R. 56; *In re Sargent's Policy*, 7 L. R. Ir. 66.

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garnishee proceedings, which we shall subsequently discuss (*n*).

Debtor's goods saleable.

The mandate of the writ only extends to the property of the judgment debtor. The sheriff can therefore make a valid sale of such goods only as belong to him. On principle, if the sheriff attempt to sell the goods of some other person, the would-be purchaser takes no property in them, for a sale by the sheriff is not a sale in *market overt*.

Where debtor is bailee.

Where, however, the debtor is in possession of goods as bailee, his interest in them may, in some cases, be disposed of, wherever, that is to say, it is a saleable interest (*o*), though not of course where a sale would determine the bailment altogether, and give the owner of the goods a

Lien.

right to possession (*p*). "A lien is a personal right which cannot be parted with, and continues so long only as the possessor holds the goods" (*q*); and, therefore, where the debtor has a mere lien over goods, his interest in them is

Hiring agreement.

manifestly not saleable (*r*). Where goods are let to the debtor under a hiring agreement, and he is in possession, his interest in the goods can be sold (*s*); and if the owner of the goods do not give notice to the sheriff of the nature of the debtor's interest in them, such owner cannot apparently be heard to allege, as against the sheriff, that the goods did not belong to the debtor (*s*). Another way of regarding the matter of alleged damage to the reversion has been to hold that since the sale by the sheriff is not in *market overt*, no damage to the owner of the reversion can arise by selling the interest of the bailee (*t*). Generally,

(*n*) *Vide infra*, p. 349.

(*o*) See, for an example, *Bradley* v. *Copley*, 14 L. J. C. P. 222.

(*p*) As in *Cooper* v. *Willomatt*, 14 L. J. C. P. 219.

(*q*) *Legg* v. *Evans*, 6 M. & W. 36.

(*r*) But notwithstanding the dictum of North, J., in *In re Rollason, Halse's claim*, 34 Ch. D. p. 496, there hardly appears sufficient reason why a lien should not be considered a security for money under sect. 12 of 1 & 2 Vict. c. 110.

(*s*) *Dean* v. *Whittaker*, 1 C. & P. 347; *Duffill* v. *Spottiswoode*, 3 C. & P. 435. And see *Duck* v. *Braddyll*, 13 Price, 455.

(*t*) *Tanered* v. *Allgood*, 4 H. & N. 438; *Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. & N. 502.

it would appear that where it is a term of the contract under which the debtor has possession of the goods, that they can be sold by him, (for example, in the case of pawnbroker's pledges,) the sheriff can sell, and can retain the goods in his hands until the right to sell arises (*u*).

Debtor bailor.

When the debtor's goods are in the possession of other persons who are with respect to them bailees, the debtor's interest cannot be seized (*x*), nor, therefore, can it be sold (*y*). The judgment creditor, has, however, the right to satisfy the person claiming a lien, and then take the goods in execution (*z*). Where the sheriff sells the goods notwithstanding the lien over them, he will be liable to the bailee for the whole amount of the lien (*a*).

Debtor's interest in partnership property.

Where the judgment debtor is a member of a partnership, the property of the firm is liable to be seized, and his interest in it sold. The duty of the sheriff is most fully discussed in Lord Justice Lindley's book on the Law of Partnership (*b*). The remedy given by the *fi. fa.* to a judgment creditor, is, in this case, most unsatisfactory. It would appear to be the wiser course for him to resort to the equitable method of execution, by obtaining the appointment of a receiver (*c*).

(*u*) This applies specially to the case of pawnbroker's pledges. *In re Rollason, Halse's claim*, 34 Ch. D. 495. The sheriff may retain, as proceeds of the execution, sums paid by pledgors to him to redeem their pledges. *Squire* v. *Huetson*, 1 Q. B. 308. In this case, the proceeds of the execution, not being the result of a sale of goods, apparently belong in any event to the execution creditor, and should not be retained in the sheriff's hands for fourteen days. See sect. 48, Bank. Act, 1883.

(*x*) Bac. Abr. tit. Execution (C) 4, of *fi. fa.* and *lev. fa.* *Balls* v. *Thick*, 9 Jur. 304; *Rogers* v. *Kennay*, 9 Q. B. 592.

(*y*) *Ex parte Hall, Re Townsend*, 14 Ch. D. 132.

(*z*) See *Duncan* v. *Garratt*, 1 C. & P. 169. "Goods pawned may be taken on an execution against the pawner on satisfaction of the pledge." *Rogers* v. *Kennay*, 9 Q. B. 592; *Scott* v. *Scholey*, 8 East, p. 476.

(*a*) *Proctor* v. *Nicholson*, 7 C. & P. 67, where the lien seems to have been principally for brandy and water supplied.

(*b*) Ed. 1878, pp. 687 *et seq.*

(*c*) See further as to this, Lind. Part. 692 *et seq.*; and *Helmore* v. *Smith* (1), 35 Ch. D. 436.

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Nothing but legal interests seizable.

We will close our remarks upon the nature of the property which can be taken under this writ, with the observation that nothing but legal property (*d*) can be seized by the sheriff (*e*). Execution against equitable interests, whether in terms of years or in goods and chattels, must be sought in another manner, of which we shall treat fully later.

SUB-SECT. (iv).—*The Proceeds of the Execution.*

Proceeds of the execution.

With reference to the proceeds of the execution, the material direction contained in the writ is: "and that you have that money and interest before us in our said Court immediately after the execution hereof to be paid to the said A. B. in pursuance of the said judgment." In practice this direction in the writ is disregarded; that is, the sheriff never does bring the money and interest into Court, but, on the other hand, pays it direct to the judgment creditor (*f*). In fact, so soon as the money is realized and in the hands of the sheriff, it becomes a debt for which he can be sued (*g*). After the sheriff has made his return, which is directed by the next clause in the writ, and has returned that he has the proceeds of execution in his hands, he is thereupon technically in contempt (for the reason, apparently, that he has neither paid the money into Court nor to the plaintiff); the creditor, therefore, can by motion against him compel compliance with the writ (*h*). In an action brought against the sheriff for

Proceeds in sheriff's hands.

Right of action.

(*d*) As to a term of years, *Scott* v. *Scholey*, 8 East, 467, is a leading authority.

(*e*) *Scarlett* v. *Hanson*, 12 Q. B. D. 213, where it was decided that the sheriff may withdraw in such a case without interpleading if he chooses to do so.

(*f*) If the sheriff pays the execution creditor with money of his own, he may subsequently levy. Gilb. Ex. 17.

(*g*) *Speake* v. *Richards*, Hob. 206. A case of *lev. fa.*, but the same somewhat strange reasoning will apply. *Perkinson* v. *Gilford*, Cro. Ca. 539, where debt was held sustainable against the sheriff's executors. *Morland* v. *Pellatt*, 8 B. & C. 722. The distinction was formerly drawn between debt and *assumpsit:* debt was founded on the return, *assumpsit* lay even before and without return. Wats. Sher. 295.

(*h*) *Stockdale* v. *Hansard*, 11 A. &

money so received by him, he is at liberty to avail himself of any defence without being absolutely concluded by his own return (*i*).

Sub-sect. (v).—*The Returns to the Writ.*

Direction to return the writ.

The next clause of the writ is: "And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution thereof. And have there then this writ." The general duties of the sheriff, with respect to the return of writs, have already been considered. And we have seen that the law on this point is of comparatively small importance, because all writs of execution are now made returnable immediately after the execution thereof (*k*).

Fieri feci.

When an execution has been completed, and the money due to the execution creditor levied by the sheriff, he should return, when required so to do, *fieri feci* (*l*). This return is incomplete unless it states either that the money is in Court, in obedience to the writ, or that the money is ready to be paid over on a day and at a place named. This return can, of course, be made only in the case where the whole debt has been levied and is available for the creditor. If part of the money only is so available, the reason should appear upon the return. This is merely an instance of the general rule that the return must answer the whole mandate of the writ. For example, where there have been insufficient goods of the execution debtor to allow of the levy of more than a part of the

Return where part only levied.

E. 253. In this case the return was that the money was "before the Queen at Westminster, to be rendered to the plaintiff as in the writ commanded."

(*i*) *Vide* instances, Tidd's Practice, at p. 1019,—on or before return of *fieri feci*.

(*k*) *Vide supra*, p. 57.

(*l*) See form of this return, Appendix, *infra*, Form No. 35. The execution creditor may thereupon proceed by summons (formerly rule of court) or action of debt or *assumpsit*. Tidd's Pr. 1019. The sheriff having acknowledged the debt on record, it is "tantamount to judgment by confession, and therefore the judgmen may be executed against himself!" Gilb. Ex. 17.

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amount due, the return is *fieri feci* as to that part, *nulla bona* as to the residue (*m*). Again, where the sum levied has been reduced by payments which the sheriff can lawfully, or is by law compellable to make, as, for example, rent, rates and taxes, the fact and amount of the reduction must appear on the return (*n*).

Nulla bona.

If the judgment debtor has no goods in the county into which the writ is directed, or, if the view that we maintain is correct (*o*), should the sheriff, after due inquiry, find none, nor is informed of any, he should return *nulla bona* (*p*). He can make this return where the debtor has an equitable interest in goods only (*q*), and also where the proceeds were exhausted in payment of rent and prior charges (*r*). The sheriff is not entitled to make this return where he has levied part, and there remain goods in his hands unsold—even as to the part which is so unsold (*s*).

Return when two writs in sheriff's hands.

Where more than one writ has been delivered into the sheriff's hands for execution at the same time, he must return to both writs what he has done under them. It is not sufficient for him merely to return that he has levied under the writ to which the return is made, and another writ of *fi. fa.* (*t*). But it is sufficient if he specifies under what prior writs he has levied, their dates, and that, "according to the priority thereof," he has seized (*u*).

SUB-SECT. (vi).—*How the Rights of Landlords are protected.*

The right of the execution creditor to realize the sum due to him is considerably modified by the prior claim of

(*m*) Wats. Sher. p. 291.

(*n*) *Vide infra*, p. 142.

(*o*) *Viz.*, that the sheriff is in truth liable only for negligence in the performance of his office. *Vide supra*, p. 79 *et seq.*

(*p*) Wats. Sher. p. 290. See form in Appendix, *infra*, p. 408, No. 36. And, for form of return of *fieri feci* as to part, *nulla bona* as to residue, No. 37.

(*q*) *Scarlett* v. *Hanson*, 12 Q.B.D. 213.

(*r*) *Wintle* v. *Freeman*, 11 A. & E. 539; *Shattock* v. *Carden*, 6 Ex. 725.

(*s*) *Slade* v. *Hawley*, 13 M. & W. 757.

(*t*) *Wintle* v. *Lord Chetwynd*, 7 Dowl. 554.

(*u*) *Chambers* v. *Coleman*, 9 Dowl. 588.

the landlord for rent due in respect of the premises where the goods are. It is advisable that we should ascertain, with certainty, the position of the landlord of premises, and the effect thereof upon execution.

Goods *in custodia legis* exempt from distress.

When goods are seized under a *fi. fa.* they cannot be distrained upon for rent due to the landlord. They are in the custody of the law, and, therefore, exempt or privileged from distress (*v*). And supposing a distress to be already levied, but no sale thereunder made, when the *fi. fa.* is placed in the sheriff's hands he can, apparently, go in and stop the proceedings under the distress (*x*).

Growing crops.

We have seen that, in the case of ordinary goods, the sheriff, or the purchaser from him, is bound to remove them within a reasonable time (*y*); but in the one case of growing crops, on which the right to distrain is given by statute (*z*), they, by their nature, remain on the land till ripe, and, once having been sold under a *fi. fa.*, until comparatively recent times, continued privileged from distress, although not actually in the hands of the purchaser (*a*). Now, however, by 14 & 15 Vict. c. 25, s. 2, so long as such growing crops shall remain on the farm or lands, they are liable, in default of sufficient distress of the goods and chattels of the tenant, to the rent which may accrue and become due after any seizure and sale under which they have been sold, and to the remedies by distress for recovery of such rent. The sheriff can, therefore, now only sell growing crops subject to the accruing rent (*b*).

14 & 15 Vict. c. 25, s. 2.

(*v*) Co. Lit. 47 a; *Eaton* v. *Southby*, Willes, 131; *Wharton* v. *Naylor*, 12 Q. B. 673; 6 D. & L. 136.

(*x*) See *Harrison* v. *Barry*, 7 Priee, 690, where the point, it is true, was not taken. Perhaps it follows, from the dictum of Vaughan, B., in *Haythorn* v. *Bush*, 2 Cr. & M. 689, that a sheriff ought not in strictness to seize, in such a case, till the rent has been paid. It must be remembered, however, that a distress is, in strictness, a mere pledge.

(*y*) *Supra*, p. 120.

(*z*) 11 Geo. II., c. 19, ss. 8, 9.

(*a*) *Peacock* v. *Purvis*, 2 Brod. & B. 362; *Wright* v. *Dewes*, 1 A. & E. 641; *Wharton* v. *Naylor*, 12 Q. B. 673.

(*b*) See 56 Geo. III., c. 50, s. 6.

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Landlord's right to rent for one year.

Although the remedy of distress is taken away by the fact of execution, the goods cannot be removed until the person, at whose suit the execution has been sued out, shall pay to the landlord (*c*) the sum due for rent, provided that the arrears do not amount to more than one year's rent; and the sheriff is empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money (*d*). If, notwithstanding this enactment, the goods are removed (*e*), the sheriff becomes personally responsible for the rent, and can be sued for it by the landlord, as can also his representatives after his death (*f*).

Position of the sheriff on removal of goods.

In the case where the goods have been sold, and the proceeds are in the sheriff's hands, summary process against him may be resorted to (*g*). In order to sustain his claim, the landlord must, of course, show that he demanded the rent from the sheriff, or given him notice that it was due (*h*), or that the sheriff had full notice and knew that it was due (*i*). When once he has notice, the law casts on him the responsibility of ascertaining the validity of the claim (*k*). It is said that the removal is the act of the sheriff, and that the execution creditor, having nothing to do therewith, is not liable to an action (*l*); but it

(*c*) The immediate, and not the superior landlord. *Bennett's case*, 2 Stra. 787. The legal owner of the reversion, *e. g.*, a trustee of a satisfied term, may be landlord. *Colyer* v. *Speer*, 4 Moore, 473.

(*d*) 8 Anne, c. 14, s. 1. In the case of tenancies less than yearly tenancies, the landlord has no claim over the goods for more than arrears accruing during four such terms or times of payment. 7 & 8 Vict. c. 96, s. 67.

(*e*) *Smith* v. *Russell*, 3 Taunt. 400.

(*f*) *Darling* v. *Hill*, Ca. temp. Hard. 255; *Palgrave* v. *Windham*, 1 Stra. 212; *Riseley* v. *Ryle*, 11 M. & W. 16; *Bible* v. *Hussey*, Ir. R. 2 C. L. 308.

(*g*) *Arnitt* v. *Garnett*, 3 B. & Ald. 440.

(*h*) *Darling* v. *Hill*, Ca. temp. Hard. 255; *Waring* v. *Dewberry*, 1 Stra. 97; *Smith* v. *Russell*, 3 Taunt. 400; *Gawler* v. *Chaplin*, 2 Ex. 503.

(*i*) *Andrews* v. *Dixon*, 3 B. & Ald. 645.

(*k*) *Augustien* v. *Challis*, 1 Exch. 279; *Hall* v. *Crawley*, 11 W. R. 344.

(*l*) *Cocker* v. *Musgrove*, 9 Q. B. p. 230; Woodfall, Landl. & Ten. 492, 13th ed.

depends merely on the authority given by him to the sheriff.

The rent which must be paid.

The rent which must be paid must be due, although it may, under the terms of the tenancy, be payable in advance (*m*). An existing tenancy must, however, be established, so that no action can be sustained against the sheriff where the tenancy has expired when the execution was put in (*n*), notwithstanding that the six months within which, by the Statute of Anne (*o*), the landlord has the right to distrain, have not expired (*p*). The rent which the sheriff or the execution creditor is bound to provide, is only such rent as has accrued due at the time of the sheriff's entering into possession, and not that which accrues during the continuance of such possession (*q*). The statute has no application where the execution creditor is himself the landlord; and therefore the sheriff, in such case, cannot retain and pay over the one year's rent to him where the remaining proceeds of the execution belong to the trustee in bankruptcy of the tenant (*r*).

Goods belonging to third persons on debtor's premises.

Where the sheriff seizes and removes goods, the landlord can sustain an action for rent against him, irrespective of whose the goods were (*s*). And yet, if the sheriff has seized goods wrongfully, he cannot justify as against the owner a payment for rent out of the proceeds of their sale; *e.g.*, where, on execution against goods of A., the tenant, the sheriff seized the goods of B. on the tenant's premises, and on an interpleader order being made for the sale of the goods the sheriff paid one year's rent to the landlord, in an action against him by B., it was held he could not justify such payment (*t*).

(*m*) *Harrison* v. *Barry*, 7 Price, 390; *Yates* v. *Ratledge*, 5 H. & N. 249.

(*n*) *Hodgson* v. *Gascoigne*, 5 B. & Ald. 88.

(*o*) 8 Anne, c. 14, s. 1.

(*p*) *Cox* v. *Leigh*, L. R. 9 Q. B. 333.

(*q*) *Hoskins* v. *Knight*, 1 M. & S. 245; *Reynolds* v. *Barford*, 7 Man. & Gr. 449, except in the case of growing crops, *vide supra*, p. 139.

(*r*) *Taylor* v. *Lanyon*, 6 Bing. 536.

(*s*) *Forster* v. *Cookson*, 1 Q. B. 419.

(*t*) *White* v. *Binstead*, 13 C. B. 304; *Lee* v. *Lopes*, 15 East, 230. See *Beard* v. *Knight*, 8 El. & Bl. 865.

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Duty of the sheriff since the statute 14 Anne.

It is submitted that the sheriff's duty (subject to the question above referred to, of how far he is entitled to do so where the distress is actually levied) is to seize the goods, whether he has notice of a claim for rent or not. This appears to follow from the words of the statute, which enacts that goods shall not be *removed* before the rent is paid, though it is clear that the sheriff is not bound to proceed to a sale of the goods until the rent, of which he has notice, has been paid by the person putting him in motion, which means that the sheriff is not to be required to find the money himself (*u*). If the sheriff proceeds to sale of the goods, he is not entitled to poundage on the amount of the rent (*x*).

The usual practice is, doubtless, for the sheriff to sell and pay out of the proceeds the sum due for rent. This practice is, from what has been above stated, clearly not a safe course for the sheriff to take; for, if the goods he sells are the property of a third person, he will be liable to that person for their value (*y*). The reason for this apparent hardship on the sheriff is, that he does not act in conformity with the statute, and require the execution creditor to pay the rent before he proceeds (*z*).

Rates for which there is power to distrain.

There are special Acts giving power to gas and other companies, having powers of rating, to distrain for the recovery of their rates. It is clear that without some such provision as that of the Statute of Anne, the distress cannot be put in upon goods already in *custodia legis*; the old principle applies.

Taxes.

By the Taxes Management Act, 1880 (*a*), s. 88 (1),—"No goods or chattels can be taken in execution, unless

(*u*) *Cocker* v. *Musgrove*, 9 Q. B. 235; *Calvert* v. *Joliffe*, 2 B. & Ad. 418.

(*x*) *Gore* v. *Goston*, 1 Stra. 643.

(*y*) It is clearly unsafe if the landlord have not demanded the rent or given notice of its being due. *Gawler* v. *Chaplin*, 2 Ex. 503.

(*z*) This strictly legal course is recommended in Woodf. Landl. & Ten. 494. *Vide infra*, Appendix, Forms 38, 39, for forms of notice by and to landlord and sheriff respectively.

(*a*) 43 & 44 Vict. c. 19.

the party issuing such execution shall, before the sale or removal of such goods or chattels, pay to the collector all arrears of duties or the land tax due at the time of seizing the said goods or chattels, or which shall be payable for the year in which such seizure shall be made, provided such duties and land tax shall not be claimed for more than one year."

And, by sub-sect. (2), the case of a claim being made for the taxes for more than a year is provided for, and also, in case of refusal to pay the said duties and land tax, the collector is authorized and required to distrain such goods and chattels notwithstanding such seizure, and to proceed to the sale thereof according to the Act.

The statute extends to land tax, inhabited house duty, and to property and income taxes.

Sect. 2.—The Writs in aid of the Writ of Fieri Facias.

O. XLIII. r. 2, is as follows:—"Where it appears upon the return of any writ of *fieri facias* that the sheriff or other officer has by virtue of such writ seized, but not sold, any goods of the person directed to pay a sum of money or costs, the person to whom such sum of money or costs is payable shall, immediately after such writ with such return shall have been filed as of record, be at liberty to sue out a writ of *venditioni exponas*."

O. XLIII. r. 2. *Venditioni exponas.*

O. XLIII. r. 5, is as follows:—"Writs of *venditioni exponas*, *distringas nuper vicecomitem*, *fieri facias de bonis ecclesiasticis*, *sequestrari facias de bonis ecclesiasticis*, and all other writs in aid of a writ of *fi. fa.* or of *elegit*, may be issued and executed in the same cases and in the same manner as heretofore."

O. XLIII. r. 5. Writs in aid of *fi. fa.* or *elegit.*

First, with regard to the writ of *venditioni exponas*. We have seen that, under a *fi. fa.*, it is the sheriff's duty to sell at a fair price, and a breach of such duty may render him

Writ of *vend. exp.*

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Return founding *vend. exp.*

liable to an action (*b*). In case, therefore, he is unable so to sell, he should return that he has the goods, and that they remain in his hands for want of buyers (*b*). If, however, the sheriff do not attempt to sell within a reasonable time, he is liable to an action (*c*); indeed, it is said that the *vend. exp.* is "only to give him alacrity" (*d*).

The form of the writ is given in the Appendix, *infra* (*e*).

Summary process not available against sheriff where this writ is.

The return on which this writ is founded, and the writ itself being available in all cases to an execution creditor, if he neglect to obtain the return from the sheriff, and to issue the writ, he cannot have recourse to the summary process of the Court against the sheriff for neglect of duty in not selling under the *fi. fa.* (*f*). The writ of *vend. exp.* is, strictly speaking, not a process distinct from the *fi. fa.*, but a part of it, and directs the sheriff to execute the writ in a particular manner (*g*). But summary process may be taken on a *vend. exp.*, just as on a *fi. fa.* or any other writ of execution (*h*). It is said that in the return which founds this writ the sheriff should state the value of the goods he has seized, and, having so returned, he is bound to find buyers (*i*). On the other hand, the sheriff may only return to the *vend. exp.* that he has seized goods, which remain in his hands for want of buyers, and the Court

Vend. exp. part of the *fieri facias.*

(*b*) *Keightley* v. *Birch*, 3 Camp. 521. The sheriff cannot make this return rightly where his brokers have in fact sold, though at an undervalue, and, the property being a term of years, he has refused to complete. *Barnard* v. *Leigh*, 1 Stark. 43. For form of return, see Appendix, Form No. 40.

(*c*) *Aireton* v. *Davis*, 9 Bing. 740; *Bales* v. *Wingfield*, 2 N. & M. 831.

(*d*) *Jacobs* v. *Humphrey*, 2 Cr. & M. 413, where action was brought after *vend. exp.* had been issued and disregarded. 2 Saund. 47ee; *Jeanes* v. *Wilkins*, 1 Ves. sen. 195.

(*e*) Appendix I. Form No. 42.

(*f*) *Clutterbuck* v. *Jones*, 15 East, 78; *Ruston* v. *Hatfield*, 2 B. & Ald. 204.

(*g*) *Hughes* v. *Rees*, 4 M. & W. 468.

(*h*) See *Dod* v. *Coleman*, 9 Dowl. 916.

(*i*) Per Holt, C. J., *Clerk* v. *Withers*, 6 Mod. p. 293. And see per Lord Mansfield, *Cameron* v. *Reynolds*, Cowp. p. 406. Upon a *vend. exp.* the sheriff "must return the money into Court." *R.* v. *Bird*, 2 Show. 87. See Tidd's Pr. 1020; *Barton* v. *Gill*, 1 D. & L. 593; *Wintle* v. *Lord Chetwynd*, 7 Dowl. 554.

will not attach him (*k*). On principle, it does not seem right that the sheriff should be charged with the goods, notwithstanding that everything has been done to obtain the sale of them.

Distringas nuper vicecomitem.

The remaining writ, which is available in aid or assistance of the *fi. fa.*, is the writ *distringas nuper vicecomitem*. The form of the writ is given in the Appendix (*l*).

When this writ available.

This writ is issuable against a sheriff who has gone out of office after a return that he has seized the goods, which remain in his hands for want of buyers (*m*). The writ is directed to the new sheriff to levy on the old one. The latter having vacated office, and being no longer, therefore, an officer of the Court, cannot be got at by summary process.

No sale under this writ.

The seizure of goods under this writ cannot be followed up by their sale. The remedy being one of distress, the goods seized are held only at common law as a pledge (*n*). In case the issues taken under this writ are of trifling or insufficient amount, a summons can be taken out to increase them, which is done by an order on the acting sheriff (*o*).

(*k*) *Leader* v. *Danvers*, 1 Bos. & P. 359. This is for the reason that the plaintiff might set up a purchaser of the goods himself.

(*l*) *Infra*, Appendix I. p. 411, Form No. 44.

(*m*) 2 Saund. 47cc (2). The same sheriff who begins an execution must end it. There were formerly two kinds of writs of *distringas nuper vicecomitem*. Holt, C. J., in *Clerk* v. *Withers*, 6 Mod. 299. See Tidd's Pr. 1021.

(*n*) Sects. 3 and 4 of 10 Geo. III. c. 50, authorised the sale of the issues levied under a *distringas* for the payment of such of the plaintiff's costs as the Court might order. See *Raban* v. *Plaistow*, 5 Burr. 2727. This enactment was repealed by 42 & 43 Vict. c. 59. It may be that, from the terms of sect. 4, sub-sect. (b) of this Act, there is still jurisdiction to order sale of the issues for payment of costs; but it is at least questionable.

(*o*) *Philips* v. *Morgan*, 4 B. & Ald. 652. See Appendix for form of summons to increase issues, Form No. 45.

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Sect. 3.—Effect of certain Statutes upon the Execution, and the Duties of the Sheriff under this Writ.

There are three statutes which have an intimate connection with execution under this writ. They are—(i) the statute 13 Eliz. c. 5, against fraudulent conveyances; (ii) the Bills of Sale Act, 1878 (with the Amendment Act of 1882); and (iii) the Bankruptcy Act, 1883. Special treatises are concerned with the subjects of these Acts, and it is to those works that the reader is referred for details of their enactments. We shall endeavour not to trench upon ground covered by others, except so far as is necessary for the due explanation of our subject, which, we trust, will be attained sufficiently for our purpose by short statements of principle.

Sub-sect. (i).—*The Statute* 13 *Eliz. c.* 5.

Statute against fraudulent conveyances.

With reference to the stat. 13 Eliz. c. 5, the Act provides, that all fraudulent and covinous conveyances, &c., are, as against the person or persons, his or their successors, executors, administrators, and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs by such guileful, covinous, or fraudulent devices and practices as aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed, or defrauded, utterly void, frustrate, and of none effect. It may be mentioned that the statute clearly embraces all manner of conveyance or transfer which can be made of property covered by a writ of *fi. fa.* It has already been explained that the sheriff, though not the agent or representative of the judgment creditor, is, nevertheless, entirely subject to his direction, and bound to proceed to execute the writ for his advantage. It is, therefore, the sheriff's duty to treat the fraudulent proceedings mentioned in the Act as void. It has been long recognized

that he is included within the intent of the Act (*p*). The sheriff's duty was thus referred to by Lord Tenterden in *Lovick* v. *Crowder* (*q*): "Now, if a party be in the possession of goods apparently the property of the debtor, the sheriff who has a *fi. fa.* to execute is bound to inquire whether the party in possession is so *bonâ fide*, and if he finds the possession is held under a fraudulent bill of sale, he is bound to treat it as null and void, and levy under the writ" (*r*).

Sheriff included in the Act.

The sheriff, being thus in the position of the creditor who sets him in motion, can show, in any action brought against him for proceeding to enforce the writ, that a transaction which he has disregarded is fraudulent. He must, however, depend in this case upon both the writ and the judgment, that is to say, he must prove his authority (*s*). The sheriff is, in fact, for this purpose, in the same position as the execution creditor, and cannot, therefore, sufficiently prove his authority by the production of the writ only.

Sheriff's position as to conveyance disregarded by him.

The sheriff being, to this extent, in the position of the execution creditor, and being compellable to prove the judgment, the *bona fides* thereof, that is, whether it is void or not under the statute, can be entered into.

Sheriff in position of execution creditor.

In an action against the sheriff for enforcing the execution wrongfully, and where the authorities are fully referred to, it was clearly decided that, although he was not a party to the fraudulent judgment and execution on

(*p*) For an early authority, see *Turvil* v. *Tipper*, Latch, 222; *Paget* v. *Perchard*, 1 Esp. 205; *Imray* v. *Magnay*, 11 M. & W. p. 275.

(*q*) 8 B. & Cr. 132.

(*r*) The case was, where sheriff's officers going in found in possession officers of the former sheriff, who had held over by collusive arrangement. See *West* v. *Skip*, 1 Ves. sen. 456.

(*s*) *White* v. *Morris*, 11 C. B. 1015, p. 1029. Jervis, C.J., in that case, says: "The writ merely authorizes and directs the sheriff to do a certain act, and his indorsement or return thereon is a mere statement that he has done as he was directed. There is no statement that a judgment exists, but only that somebody says that a judgment has been obtained." May on Fraudulent Conveyances, 2nd ed. p. 173.

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which the question arose, evidence of the fraud could be given (*s*). Again, in an action by the execution creditor against the sheriff for not enforcing the execution, he can show in defence that the creditor's judgment and execution were fraudulent under the statute (*t*).

Sheriff's liability to person issuing execution.

If it be once established that the 13 Eliz. c. 5 is as available to the sheriff as to the execution creditor himself, it appears to follow that it is the sheriff's duty to discover a fraud committed under that Act, or be liable for the consequences of his not so doing (*u*). This would render him liable to an action at the suit of any creditor who had issued a writ of *fi. fa.* for execution, if at any time it could be shown that a fraud had been committed, and that the goods were in the possession of the assignees from the debtor when the writ was placed in the sheriff's hands. It is submitted that the true relationship between the sheriff and the creditor, which was pointed out in the preceding Chapter, renders the former liable only for negligence, and that the doubt expressed in *Remmett* v. *Lawrence* is unfounded. The sheriff may, in all cases of suspected or alleged fraud, interplead or apply for an indemnity, and the Court acts on the principle that where it is possible it will force one of the two conflicting parties to indemnify him (*x*). Where, however, no such indemnity is obtained, the sheriff stands the risk of loss, on the lines of liability which we have attempted to explain.

(*s*) *Imray* v. *Magnay*, 11 M. & W. 267. The judgment of Mr. Baron Parke is particularly clear. This case was followed in *Christopherson* v. *Burton*, 3 Ex. 160. Some considerable doubt is thrown on the justice of the decision by Campbell, C. J., and Erle, J. (who was counsel in *Imray* v. *Magnay*), in *Remmett* v. *Lawrence*, 15 Q. B. 1004.

(*t*) *Lovick* v. *Crowder*, 8 B. & C. 132; *Shattock* v. *Carden*, 6 Ex. 725. See, however, the doubt in *Wormoll* v. *Young*, 5 B. & C. 660. The proposition that a sheriff is bound to execute a writ of execution according to the exigency thereof (Wats. Sher. 67) is not therefore universally true.

(*u*) This result is the reason for the doubt thrown on *Imray* v. *Magnay*, 11 M. & W. 267, by *Remmett* v. *Lawrence*, 15 Q. B. 1004.

(*x*) May, Fraud. Conv. pp. 154—158.

SUB-SECT. (ii).—*The Bills of Sale Act*, 1878 (*y*); *The Bills of Sale Act*, 1878, *Amendment Act*, 1882 (*z*).

Where debtor has given a bill of sale.

Where the debtor has, before seizure of his goods, made a bill of sale thereof, the liability and position of the sheriff are analogous to what they are in a case within the 13 Eliz. c. 5, just discussed. The general plan of the Bills of Sale Act, 1878, is to make certain specified kinds of transfers of property in goods of no avail against execution creditors and certain other persons, unless such specified transfers are registered under the provisions of the Act.

Bills of Sale Act, 1878.

Bills of sale not defined.

Bills of sale are not defined; but an exhaustive list of what the expression includes is given in sect. 4 of the Act. It need not be stated that the list does not comprise every conceivable method of assignment of chattels; for example, in cases where, by the common law, an assignment by word of mouth is sufficient to transfer the property in goods, and such method of assignment is adopted, the Act does not seem to apply at all, as there is nothing to register (*a*). Again, it seems to be the better opinion that the Acts have no operation except where there is a power to seize, either present or future, in the grantee or assignee of the chattels. To investigate fully, however, what goods are seizable under a writ of *fi. fa.*, by reason of non-compliance with the Bills of Sale Act, would necessitate a review of the whole law on the subject. Such questions do not manifestly enter within the scope of our work. The reader is referred to the decided cases, and the numerous works on the subject. Before leaving this matter, it deserves notice that where there is a document which is, as against an execution creditor, rendered void by the Act, the position of the sheriff is not left to be matter of judi-

(*y*) 41 & 42 Vict. c. 31.
(*z*) 45 & 46 Vict. c. 43.

(*a*) See Bramwell, L. J., in *Union Bank of London* v. *Lenanton*, 47 L. J. Ex. p. 415.

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cial decision, as is the case with the 13 Eliz. c. 5, which we have discussed, but is set forth distinctly in the Bills of Sale Act itself.

Section 8 is as follows :—

Act of 1878, s. 8.

"Every bill of sale to which this Act applies shall be duly attested, and shall be registered under this Act within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriffs' officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any Court authorizing the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void (*b*) so far as regards the property in or right to possession of any chattels comprised in such bill of sale, which at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment, or of executing such process (as the case may be), and after the expiration of such seven days are in the possession, or apparent possession, of the person making such bill of sale (or of any person against whom the process has issued under or in the execution of which such bill has been made or given, as the case may be)."

Effect of sect. 8.

It thus appears that, by the terms of the section, an unregistered bill of sale, as defined by the Act, is of no avail against the sheriff. So far as the sheriff is concerned, no question can, therefore, *under this statute*, be raised by the claimants under the bill of sale as to the validity of the

Validity of judgment cannot be questioned.

(*b*) The bill of sale is void only to the extent necessary to satisfy the execution creditor. *Ex parte Blaiberg, Re Toomer*, 23 Ch. D. 254.

judgment under which the sheriff proceeds. Such persons cannot claim at all as against the sheriff unless their bill of sale complies with the Act. Of course, in case of an informality in the writ, which renders the execution a nullity, no doubt the person opposing the sheriff could raise the point that he was not acting "in the execution of any process of any Court," properly so called; but in such case the judgment cannot be discussed, the sheriff's justification being the writ under which he acts.

Apparent possession.

Again, only those goods and chattels can be seized which are, under the conditions above mentioned, in the possession, or apparent possession, of the person making the bill of sale. "Apparent possession" is a technical term, having, under the Act, a certain precise meaning.

Bills of Sale Act, 1878, s. 4.

By sect. 4,—"Personal chattels shall be deemed to be in the apparent possession of the person making or giving a bill of sale so long as they remain, or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person."

Bills of Sale Act, 1882.

The Bills of Sale Act, 1878, Amendment Act, 1882, adopts the definition of bills of sale contained in the former Act. It enforces the necessity of registration wherever the bill of sale has been made or given as a security for money. A form is further prescribed by the Act, which must essentially be adhered to. Here, again, it would be absurd, within the scope of this work, to attempt a summary of the law on the subject; but for our purpose the matter is rendered somewhat simpler, because all documents not complying with the provisions of the Act on the subject are rendered absolutely void. There can be no question, therefore, of the bearing of the execution on the document itself; for if it be once established that the due formalities have not been complied with, no person can have any title under it whatsoever.

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Interpleader.

It is specially where claims are made by persons under bills of sale that the relief afforded to the sheriff by the Interpleader Acts (*c*) is taken advantage of. By means of this method of disposing of questions between claimants and execution creditors, the liability of the sheriff is reduced to a minimum in all cases where the rules apply. It is not proposed to discuss the subject of interpleader, nor the practice arising thereon.

SUB-SECT. (iii).—*The Bankruptcy Act*, 1883 (*d*).

Under the law of bankruptcy, an execution completed over the effects of a debtor who becomes bankrupt has certain distinct results, both with relation to the status of the execution debtor and to the duty of the sheriff.

Act of bankruptcy by seizure and sale; s. 4, sub-s. (1) (e).

By sect. 4, sub-s. (1) (e), of the Bankruptcy Act, 1883, a debtor commits an act of bankruptcy—"If execution issued against him has been levied by seizure and sale of his goods under process in an action in any court, or in any civil proceeding in the High Court."

Execution to be completed before bankruptcy; s. 45, sub-s. (1).

By sect. 45 (1),—"Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

Time when execution is completed; s. 45, sub-s. (2).

"(2) For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver."

The effect of this last sub-section upon execution against

(*c*) Now for the most part comprised in O. LVII.

(*d*) 46 & 47 Vict. c. 52.

land will be referred to in the Chapters on Elegit and Equitable Execution.

By sect. 46 of the same Act:—

Duty of sheriff on receiving notice of receiving order.

"(1) Where the goods of a debtor are taken in execution, and before the sale thereof notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods to the official receiver or trustee under the order, but the costs of the execution shall be a charge on the goods so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge.

Retention of proceeds of execution when judgment over 20*l.* for fourteen days.

"(2) Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding 20*l.*, the sheriff shall deduct the costs of the execution from the proceeds of sale, and retain the balance for fourteen days; and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor, but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him.

Execution valid, notwithstanding that it is an act of bankruptcy.

"(3) An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall, in all cases, acquire a good title to them against the trustee in bankruptcy."

It is only under the writ of *fi. fa.*, or analogous process of inferior courts, that goods can be seized in execution and sold (*e*). Therefore, it is alone under that writ that

(*e*) Under the term sheriff is included, by sect. 168, any officer charged with the execution of a writ or other process. This does not mean a bailiff or man in possession, but does mean the under-sheriff. *Ex parte Warren, Re Holland*, 15 Q. B. D. 48.

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Seizure *and* sale necessary.

this particular act of bankruptcy can arise. There is, by the terms of the sub-section, no act of bankruptcy until there has been a levy by seizure *and* sale. This, doubtless, covers the case where the execution has been partially satisfied only (*f*). Where the whole of the goods seized remain in the sheriff's hands for want of buyers, there is clearly no act of bankruptcy, and he is bound, by sect. 46, sub-sect. (1), to hand over the goods to the trustee. With the effect of the act of bankruptcy itself we have little to do; the consideration of the subject is a part of the law relating to bankruptcy. At the same time, where an act of bankruptcy has been committed, it has a direct interest for us which should be borne in mind.

Proceeds do not become property of creditor till after fourteen days.

By the terms of sect. 46, above quoted, the sheriff must retain the proceeds of sale in his hands for fourteen days. Those proceeds, where realized under a sale of goods (*g*), cannot, therefore, become the indefeasible property of the execution creditor till after the expiration of that period. Where the execution so completed is the only act of bankruptcy, and the money is, after the fourteen days' interval, handed to the creditor, he can retain it as against the trustee. This appears to be the only case in which it is clear that the creditor can, as against the trustee in bankruptcy of a debtor who becomes bankrupt within three months after the seizure and sale, retain the benefit of his execution. Where, prior to the execution, an act of bankruptcy available for adjudication has been committed, it is, perhaps, uncertain what the rights of an execution creditor are, notwithstanding that he may have levied by seizure and sale. If he has notice of such an act of bankruptcy, before completion of the execution, it is clear that, under sect. 45, he cannot retain the benefit of the execution he puts in. If he has no such notice, but, nevertheless, such

Effect of notice.

(*f*) Consider *dictum* of Pollock, B., in *Jones* v. *Parcell*, 11 Q. B. D. 430, p. 433.

(*g*) *Vide supra*, p. 131 *et seq.*, as to cash, &c.

an act of bankruptcy exists, it would appear that he cannot retain the benefit of an execution, because of the relation back of the trustee's title (*h*), the execution being bad for the reason that it is levied not upon the property of the bankrupt, but upon that of the trustee. The enactments of the present Bankruptcy Act differ widely upon this subject from those formerly in force.

Proceeds other than proceeds of seizure and sale.

The sheriff is not bound to retain in his hands for fourteen days the proceeds of an execution, excepting where such proceeds are the results of seizure and sale. Therefore, notwithstanding the apparently clear terms of sect. 45, a payment by the execution debtor to the sheriff should be paid over to the creditor, and the trustee has no right to it (*i*).

From what date fourteen days begins to run.

It is difficult, where the sales under one *fi. fa.* are at different times, *i. e.*, on different days, to ascertain from what date the fourteen days prescribed by the section is to run. It has been decided that the section has no operation until the sheriff has realised, at any rate, to the amount of the debt, the goods he has seized, and, therefore, that the fourteen days runs from the last day of sale. The fact of there being several distinct seizures does not seem to have weighed with the Court (*k*).

Sect. 4.—The Sheriff's right to Poundage and Expenses of Execution.

Right to poundage given by statute.

By the statute West. I., in affirmance of the common law, it was provided that no sheriff should take any reward to do his office (*l*); but, by virtue of various statutes, he has now the right to charge, and can now recover,

(*h*) Sect. 43.

(*i*) *Re Brooke*, 9 Ch. 301; *Stock* v. *Holland*, L. R. 9 Exch. 147; and, under the present Act, *Ex parte West Cannock Colliery Co., Re Pearson*, 3 Mor. B. R. 187.

(*k*) *Jones* v. *Parcell*, 11 Q. B. D. 430.

(*l*) 2nd Inst. 209; *Woodgate* v. *Knatchbull*, 2 T. R. p. 158.

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poundage (a claim in the nature of a claim for work and labour (*m*)) and fees upon executions. His right to poundage is distinct from his right to other fees.

The right to poundage is given by the statute 28 Eliz. c. 4, which still, notwithstanding its repeal (*n*), entitles the sheriff to have, receive, and take, for the serving and executing of any extent or execution upon the body (*o*), lands, goods, or chattels of any person, one shilling in the pound for the first 100*l.*, and sixpence in the pound for every pound above 100*l.* (*p*) that he shall levy or extend and deliver in execution (*q*). Where simultaneous writs are delivered to sheriffs in different counties, the sheriff who first levies the execution appears entitled to the whole poundage (*r*). The statute presupposes that only one execution can be levied. The statute provided for treble damages against a sheriff "doing to the contrary" (*s*), and for a penalty against him of forty pounds, one moiety whereof is to go to the person suing therefor (*t*). The treble damages, being given by statute in a case where damages were recoverable at common law, carried treble costs (*u*). This right does not appear to be interfered with by the terms of O. LXV. r. 1, giving the Court discretion as to costs (*x*). The recovery of treble damages is, however, now abrogated by the sections of 50 & 51 Vict. c. 55, which we shall immediately proceed to discuss.

"Shall so levy."

The words in this statute of Elizabeth, "shall so levy,"

(*m*) *Graham* v. *Grill*, 2 M. & S. p. 297.

(*n*) 50 & 51 Vict. c. 55, s. 39, sub-s. (5). For Act, see Appendix II.

(*o*) This does not extend to a writ of attachment. *Vide infra*, Chap. on Attachment.

(*p*) *Lyster* v. *Bromley*, Cro. Car. 286.

(*q*) The words "deliver in execution" must be confined to lands. See *Mortimore* v. *Cragg*, 3 C. P. D. p. 218.

(*r*) *Rex* v. *Barber*, 3 Anstr. 717; *Rex* v. *Bowles*, Wightw. 116.

(*s*) Meaning, levying more than the statute entitles him to do.

(*t*) The Irish Act, corresponding to 28 Eliz. c. 4, has been repealed as to the treble damages. *Byrne* v. *Hutchinson*, 9 Ir. R. C. L. 75.

(*u*) *Deacon* v. *Morris*, 2 B. & Ald. 393.

(*x*) *Hasker* v. *Wood*, 54 L. J. Q. B. 419; 33 W. R. 697.

mean "shall seize and get the money" (*y*). A sheriff cannot, therefore, refuse to execute a writ until he has his fees (*z*); and if he does not seize he is not entitled to poundage, although the money due be paid to him after the writ is in his hands for execution, and the money may in some sense be said to have been recovered by means of it (*a*). Tender before seizure is equivalent to payment, so that the sheriff is not, in such case, entitled to poundage (*b*), nor is he entitled to levy upon the sum thus tendered (*c*). In a recent case it was decided that the sheriff is entitled to poundage only in respect of the amount actually realized by the sale of the goods seized (*d*); but this decision has been dissented from, and the opinion of Cockburn, C. J., expressed, that if the writ be *virtually* executed by the sheriff's going down to the premises, and getting payment, the sheriff becomes entitled to poundage (*e*). In all cases it would appear to be merely a question of whether the amount has been levied in fact. A seizure, followed by payment, undoubtedly constitutes a sufficient levy to give a right to poundage, and the test of whether or not a seizure has been effected is, whether an action of trespass could be brought against the sheriff's officer if he were not justified by the writ (*f*). But where there was a seizure merely, and before sale the writ was set aside, the sheriff was held not entitled to poundage (*g*). And again, where, in consequence of the bankruptcy of the debtor supervening, the execution was not fructuous, it was decided that the sheriff had no right to poundage (*h*).

Seizure necessary.

Tender before seizure.

(*y*) *Mortimore* v. *Cragg*, 3 C. P. D. p. 219.

(*z*) *Hescott's case*, 1 Salk. 330. He becomes liable to indictment if he extort fees in this manner.

(*a*) *Nash* v. *Dickenson*, L. R. 2 C. P. 252.

(*b*) *Colls* v. *Coates*, 11 A. & E. 826; 3 P. & D. 511.

(*c*) *Brun* v. *Hutchinson*, 2 D. & L. 43.

(*d*) *Roe* v. *Hammond*, 2 C. P. D. 300.

(*e*) *Bissicks* v. *Bath Colliery Co.*, 2 Ex. D. 459; on appeal, 3 Ex. D. 174.

(*f*) *Mortimore* v. *Cragg*, 3 C. P. D. 216; *vide supra*, p. 120.

(*g*) *Miles* v. *Harris*, 12 C. B. N. S. 550; 31 L. J. C. P. 361.

(*h*) *In re Ludmore*, 13 Q. B. D. 415.

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Poundage, how calculated.

The poundage is not calculated on the sum which the sheriff is directed to levy, nor upon the sum realized by a sale, but on the amount paid to the execution creditor as the proceeds of the execution (*i*). This appears to be subject to a *dictum*, that where a sheriff realises and pays rent due, he is entitled to poundage on the amount of the rent, but not from the landlord (*k*). There must, of course, be an effectual levy, and not an abortive levy, over the goods of a third person (*l*).

Fees other than poundage.

Entirely distinct from the right to poundage given by the above statute of 28 Eliz. c. 4, is the right to fees, a scale of which has been adopted in pursuance of 1 Vict. c. 55 (*m*). That statute, sect. 2, provided that sheriffs might, in the execution of process directed to them, demand, take, and receive such fees, and no more, as should be allowed by any officer of the several Courts of law at Westminster charged with the duty of taxing costs under the sanction and authority of the judges of the said Courts respectively.

The list of fees prepared in pursuance of this enactment is set forth in the Appendix (*n*). The statute repealed several statutes relating to the remuneration of sheriffs, but left untouched the 28 Eliz. c. 4. Poundage can, therefore, be charged and recovered in addition to the

(*i*) See *Byrne* v. *Hutchinson*, 9 Ir. R. C. L. 75, where the sum to be levied appearing on the indorsement was held to be the amount on which poundage was chargeable. See also *Rex* v. *Robinson*, 2 C. M. & R. 334; 4 Dowl. 447; *Evans* v. *Manero*, 7 M. & W. 463; 9 Dowl. 256; *Chapman* v. *Bowlby*, 1 D. N. S. 83. It is perhaps a question whether poundage can be claimed in respect of anything but the person, land, or goods and chattels—*e. g.*, securities for money under sect. 10 of 1 & 2 Vict. c. 110. See *Rex* v. *Villers*, 8 Price, 587.

(*k*) *Gore* v. *Goston*, 1 Stra. 643. This is entirely distinct from the question in *Davies* v. *Edmonds*, 13 L. J. Ex. 1; 12 M. & W. 31, which arose under the table of fees mentioned *infra*, Appendix III.

(*l*) *Bilke* v. *Havelock*, 3 Camp. 374; *Cole* v. *Terry*, 5 L. T. N. S. 347.

(*m*) Still in force, notwithstanding the repeal of the statute itself, 50 & 51 Vict. c. 55, s. 39, sub-s. (5). See Appendix II.

(*n*) Appendix III., *infra*, p. 471.

fees allowed under the scale (*o*). As to those fees in detail, reference must be made to the Appendix (*p*). The sheriff is entitled only to those fees which are set forth in the list, and not to any extra fees (*q*).

Who liable for sheriff's fees.

The person at whose suit the writ of execution is issued must bear the expenses of it (*r*). The sheriff, being entitled to his poundage and fees as of right, can sue the execution creditor for them (*s*). It makes no difference to his right to recover that the whole judgment and execution have been set aside as irregular; provided his acts were justified by the writ, he has nothing to do with the regularity or irregularity of the proceeding under which it issued (*t*). It has, however, been held that he is not entitled to maintain his action where, after he has seized, but before sale, the proceedings under the judgment have been stayed (*u*).

The sheriff has no right of action for his fees against a solicitor who simply places a writ in his hands for execution (*v*); though where the solicitor expressly requests that a particular bailiff shall execute the process, that bailiff can recover the amount of his fees from him (*x*).

O. XLII. r. 15.

By O. XLII. r. 15,—"In every case of execution the party entitled to execution may levy the poundage, fees, and expenses of execution, over and above the sum recovered."

(*o*) *Davies* v. *Griffiths*, 4 M. & W. 377; 7 Dowl. 204; *Pilkington* v. *Cooke*, 16 M. & W. 615.

(*p*) Appendix III., *infra*, p. 471.

(*q*) *Slater* v. *Hames*, 7 M. & W. 413; 9 Dowl. 221; 10 L. J. Ex. 100; *Davies* v. *Edmonds*, 12 M. & W. 31; 1 D. & L. 395; 13 L. J. Ex. 1; *Phillips* v. *Lord Canterbury*, 11 M. & W. 619; 12 L. J. Ex. 401; where it was pointed out that by the authority of the judges alone could additional fees be allowed.

(*r*) Wats. Sher. 112.

(*s*) As to poundage, see *Tyson* v. *Paske*, 2 Ld. Raym. 1212.

(*t*) *Bullen* v. *Ansley*, 6 Esp. 111; *Rawstorne* v. *Wilkinson*, 4 M. & S. 256.

(*u*) *Miles* v. *Harris*, 12 C. B. N. S. 550.

(*v*) *Royle* v. *Busby*, 6 Q. B. D. 171. This decision summarises the authorities on the liability of the solicitor. *Bilke* v. *Havelock*, 3 Camp. 374.

(*x*) *Foster* v. *Blakelock*, 5 B. & C. 328.

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The levy for fees and poundage.

This rule is taken from sect. 123, C. L. P. Act, 1852 (*y*). The costs of the specific execution only can be levied under this rule (*z*). As to what further is comprised in the words "fees and expenses of execution," see list in Appendix (*a*). The party entitled to execution can levy; the rule gives the sheriff himself no new right to recover his fees (*b*). It is doubtful whether this rule extends to execution under an *elegit* (*c*). It does not extend to the general costs of the inquisition, but is confined to sheriffs' charges (*d*).

By sect. 46 of the Bankruptcy Act, 1883, sub-sect. (1), the costs of execution (*dd*) are made a charge upon the goods delivered by the sheriff to the official receiver or trustee, and under sub-sect. (2), in case of a sale, the sheriff may deduct the costs of execution from the amount realized (*e*).

As we have seen, under sub-sect. (1), where there has been no sale, poundage cannot be recovered by the sheriff (*f*).

Costs of advertisement of sale under *fi. fa.*

There may be a question, notwithstanding sect. 145 of the Bankruptcy Act, 1883, whereby, in all executions for over 20*l.*, the sheriff is required to sell by public auction, whether he can recover any more than the amount allowed by the scale, and whether he can, therefore, charge for advertising the sale (*g*).

Extortion.

By sub-sect. (2) of sect. 29 of the Sheriffs Act, 1887 (*h*),

(*y*) For old law and history, see Wats. Sher. 113; *Sneary* v. *Abdy*, 1 Ex. D. 299, judgment of Field, J.

(*z*) *Marquis of Salisbury* v. *Ray*, 8 C. B. N. S. 193.

(*a*) Appendix III., *infra*, p. 471.

(*b*) See *Goode* v. *Langley*, 7 B. & C. 26. But see *Curtis* v. *Mayne*, 2 Dowl. N. S. 37; and *Sneary* v. *Abdy*, 1 Ex. D. 299.

(*c*) *Mahon* v. *Miles*, 30 W. R. 123.

(*d*) *Porter* v. *Wotton*, 28 Sol. Jo. 548.

(*dd*) This includes such expenses only as the sheriff is bound to incur, and does therefore include expenditure by him for cutting and carrying crops. *In re Woodham, Ex parte Conder*, 20 Q. B. D. 40.

(*e*) The taxation of the costs recoverable under these sub-sections is provided for by G. R. 118, 119, respectively.

(*f*) *In re Ludmore*, 13 Q. B. D. 415.

(*g*) *Braithwaite* v. *Marriott*, 1 H. & C. 591; under similar section of Act of 1861. See *Re Crayeraft, Ex parte Browning*, 8 Ch. D. 596.

(*h*) 50 & 51 Vict. c. 55, for which see Appendix II., *infra*.

if any person, being either a sheriff, under-sheriff, bailiff, or officer of a sheriff, or being employed in levying or collecting debts due to the Crown by process of any Court, or being an officer to whom the return or execution of writs belong, does any of the following things (*inter alia*) :—

(*b*) Takes or demands any money or reward under any pretext whatever, other than the fees or sums allowed by or in pursuance of this or any other Act;

he and any person procuring the commission of any such offence shall, without prejudice to any other punishment under the provisions of this Act, but subject as thereinafter mentioned, be liable—(1) to be punished by the Court as hereinafter mentioned; and (2) to forfeit two hundred pounds, and to pay all damages suffered by any person aggrieved, and such forfeiture and damages may be recovered by such person as a debt by an action in her Majesty's High Court of Justice.

Liability to process for contempt for extortion.

Sub-sect. (3) of the same section provides for the punishment of any person guilty under the above sub-section, in like manner as a person guilty of contempt of Court may be punished; and sub-sect. (4) gives discretion to the Court to order the costs of a complaint against an officer to be paid by one party to the other (*i*). In like manner, any person, not being such officer as aforesaid, who assumes or pretends to act as such, or demands or takes any fee or reward under colour or pretext of such office, is also guilty of a contempt of Court (sub-s. 6). Any proceeding for contempt in pursuance of this section must be brought within two years after the alleged offence was committed, and, if the proceedings be in a summary manner, shall be taken before the end of the sittings of the Court held next after the offence was committed.

Costs of application.

The motion under the Act, of which the above is in

(*i*) Under the former enactment, s. 4 of 1 Vict. c. 55, this was held not to apply where the costs were by consent referred for taxation. *Curlewis* v. *Bird*, 1 Dowl. N. S. 752; 6 Jur. 669.

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substance a re-enactment, could be both against the sheriff for an order that he do refund, and against the officer for leave to issue a writ of attachment (*k*).

Remedy for extortion by indictment.

At common law, there was a remedy for extortion by indictment, but only against the person who was actually guilty of the offence. The sheriff himself, therefore, could, as a rule, only be proceeded against by action; for he was seldom, in practice, party to an extortion (*l*).

Action for extortion.

The remedy by action still exists, though, by reason of the smallness of the sums generally in dispute, it is seldom, if ever, resorted to (*m*).

Where the sheriff claims more than he is entitled to under an order that he is to be paid possession money, *e.g.*, for a second man in possession, when he was not necessary, it is not necessarily extortion (*n*). It is a question whether, if the sheriff, at the request of the party, does something which it is not his duty to do under the writ, he can be made liable for extortion in deducting remuneration therefor from the proceeds of the execution (*o*).

(*k*) *Blake* v. *Newburn*, 17 L. J. Q. B. 216; 5 Dowl. & L. 601.

(*l*) Wats. Sher. 115.

(*m*) *Longdill* v. *Jones*, 1 Stark. 345; *Pilkington* v. *Cooke*, 16 M. & W. 615. The extortion does not make the sheriff liable as trespasser *ab initio*. *Shorland* v. *Govett*, 5 B. & C. 485.

(*n*) *Long* v. *Bray*, 10 W. R. 841.

(*o*) *Stephens* v. *Rothwell*, 6 Moore, 338.

CHAPTER V.

THE WRIT OF ELEGIT.

THE method of enforcing a judgment or order for the recovery of money, which it is proposed to discuss in this Chapter, is that available where recourse is had to land. The only writ for such a purpose is the writ given by the Statute of Westminster II., still called, and, as we shall see, still with reason called, the writ of *elegit*.

The subject of this Chapter will be best treated of in the following divisions or sections :— Arrangement.

SECT. 1. The writ, and the Statutes on which it is founded.

2. The duties of the sheriff under the writ, and its effect on estates in land.

3. The effect of certain Statutes on the rights of judgment creditors with respect to land.

4. The sheriff's right to poundage.

SECT. 1.—THE WRIT, AND THE STATUTES ON WHICH IT IS FOUNDED.

"At the common law, where a subject sued execution upon a judgment for debt or damages, he should not have the body of the defendant or his land in execution (unless it were in special cases), and the reason of the law was that the body, in case of debt, should not be detained in prison, but be at liberty, not only to follow his own affairs and business, but also to serve the king and his country, when need should require; nor to take away the possession Execution at common law.

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of his lands in that case, for that would hinder the following of his husbandry and tillage, which is so beneficial to the commonwealth, whereof you may read at large in Sir William Herbert's case" (*a*).

Statute of Elegit, Westminster II. c. 18.

Such being the common law, the Statute Westminster II. c. 18, gave the writ of *elegit*.

The words of the statute are:—"When debt is recovered or acknowledged in the King's Court, or damages awarded, it shall be from henceforth in the election of him that sueth for such debt or damages to have a writ of *fieri facias* (*b*) unto the sheriff to levy the debt of the lands and goods, or that the sheriff shall deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough) and the one half of his land, until the debt be levied upon a reasonable price or extent. And if he be put out of that tenement, he shall recover by a writ of *novel disseisin*, and after by a writ of *re-disseisin*, if need be."

The writ of execution issued to the sheriff in pursuance of this statute is called an *elegit* (*c*).

Statute of Elegit still foundation of execution as to land.

The writ given by this statute is still in use, with its time-honoured and cumbrous procedure, in practically the same condition as at the time when it was established. It remains the proper remedy whenever it is sought to have recourse to a legal estate in land for the satisfaction of a debt. The operation of the writ has been substantially extended and modified by two statutory enactments only. We do not intend to imply, that those two enactments are the only

(*a*) Co. 2nd Inst. 394. An excellent and more scientific reason for there being no execution against land at the common law is given in these words: "Not only because the debt was contracted upon the personal security, but also that the lord might not have a stranger put upon him, but those only were to enjoy the land who came in by feudal donation." Gilb. Ex. 32. See, also, notes to *Underhill* v. *Devereux*, 2 Saund. 68 *i*.

(*b*) *Fieri facias.* "Here under these words is also the writ of *levari facias* included." Co. 2nd Inst. 395.

(*c*) The reason for this name is stated in note to 2 Saund. 68 c, 5th ed. The entry on the roll being *elegit sibi liberari omnia catalla, &c.*

ones which it will become necessary for us to consider, but they are the only ones of practical application affecting the writ itself.

Writ extended by sect. 11 of 1 & 2 Vict. c. 110. Sect. 11.

The scope and operation of the writ was extended by sect. 11 of 1 & 2 Vict. c. 110. This section is, in a great measure, the foundation of the law of the modern writ of *elegit*. It deserves, therefore, special attention. After reciting that the existing law is defective in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, &c., it proceeds: "be it therefore further enacted, that it shall be lawful for the sheriff or other officer to whom any writ of *elegit*, or any precept in pursuance thereof, shall be directed, at the suit of any person, upon any judgment which, at the time appointed for the commencement of this Act, shall have been recovered, or shall be thereafter recovered in any action in any of her Majesty's Superior Courts at Westminster, to make and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall, at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of *elegit* is sued out, which lands, tenements, rectories, tithes, rents, and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the Court, out of which such execution shall have been sued out, as a tenant by *elegit* is now

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subject in a Court of equity: provided always, that such party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution, shall be liable, and is hereby required to make, perform, and render to the lord of the manor, or other persons entitled, all such and the like payments and services as the person against whom such execution shall be issued would have been bound to make, perform, and render, in case such execution had not issued; and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied: provided also, that as against purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this Act, such writ of *elegit* shall have no greater or other effect than a writ of *elegit* would have had in case this Act had not passed."

Copyholds.

Effect of sect. 11.

The effect, shortly stated, of the section may be said to be, that it extended the remedy by writ of *elegit* to all the debtor's lands instead of half, which alone were subject to it under the Statute of Westminster II., and further subjected to the writ thus extended, lands and estates which could not, before the enactment, be touched in execution either by *elegit* or in any other way. What lands and estates are thus included will appear in the following section of this chapter, where we discuss the operation of the writ in detail.

No longer affects goods, Bankruptcy Act, 1883, s. 146, sub-s. (1).

The remaining material enactment upon the operation of the writ which we shall at present notice, is section 146, sub-s. (1) of the Bankruptcy Act, 1883, by which "The sheriff shall not, under a writ of *elegit*, deliver the goods of a debtor, nor shall a writ of *elegit* extend to goods" (*d*).

(*d*) By sect. 168 of the Act the word "goods" is construed to mean chattels personal. See *Richardson* v. *Webb*, 1 Mor. B. R. 40.

This section was passed to abolish what was characterised by James, L. J., as an absurd anachronism, for the writ included goods. This means of execution over chattels had, however, become almost obsolete, when it was discovered that an execution creditor, seizing goods under this writ, could make himself a secured creditor, and thereby on the bankruptcy of the execution debtor evade the usual consequences of seizing goods in execution for more than 50*l.* (*e*).

We have seen that by O. XLII. r. 17, a writ or writs of *elegit* can be issued to enforce the payment of money payable under a judgment or order (*f*).

Form of writ of *elegit*.

The form of the writ prescribed (*g*) is given in Appendix H., No. 3, and when amended, in order to conform to sect. 146 of the Bankruptcy Act just referred to, is as follows:—

Victoria, by the grace of God, &c.

To the sheriff of , greeting:

Whereas lately in our High Court of Justice, in a certain action [*or* certain actions, *as the case may be*] there depending, wherein A. B. is plaintiff, and C. D. defendant [*or* in a certain matter there depending, intituled "In the matter of E. F.," *as the case may be*], by a judgment [*or* order, *as the case may be*] of our said Court made in the said action [*or* matter, *as the case may be*], and bearing date the day of , it was adjudged [*or* ordered, *as the case may be*] that C. D. should pay unto A. B. the sum of £ , together with interest thereon at the rate of £ per centum per annum, from the day of , together also with costs, as in the said judgment [*or* order, *as the case may be*] mentioned, and which costs have been taxed and allowed by , one of the taxing officers of our said Court, at the sum of £ , as appears by the certificate of the said taxing officer, dated the

(*e*) *Ex parte Abbott, Re Gourlay*, 15 Ch. D. 447.

(*f*) *Vide supra*, p. 108.

(*g*) O. XLII. r. 14.

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day of . And afterwards the said A. B. came into our Court, and according to the statute in such case made and provided, chose to be delivered to him all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick as the said C. D., or anyone in trust for him, was seised or possessed of on the day of in the year of our Lord [*the day on which the judgment or order was made*] (*h*), or at any time afterwards, or over which the said C. D. on the said day of , or at any time afterwards, had any disposing power, which he might without the assent of any other person exercise for his own benefit, to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ , together with interest upon the said sum of £ at the rate of £ per centum per annum from the day of , and on the said sum of £ (costs) at the rate of £4 per centum per annum from the day of shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A. B. by a reasonable [price or (*i*)] extent all such lands and tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C. D., or any person or persons in trust for him, was or were seized or possessed of on the day of [*the date of the certificate of taxation. The writ must be so moulded as to follow the substance of the judgment or order*], or at any time afterwards, or over which the said C. D., on the said day of , or at any time afterwards, had any disposing power which he

(*h*) *Vide infra*, p. 188.

(*i*) These words "price or" which refer to goods seem now unnecessary. See 2 Saund. 68 g, *in notis*, as to meaning of words "price" and "extent." Wats. on Sher. p. 307 (*d*).

might, without the assent of any other person, exercise for his own benefit, to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ , together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us in our Court aforesaid, immediately after the execution thereof, under your seals, and under the seals of those by whose oath you shall make the said extent. And have there then this writ.

WITNESS, &c.

No rules of court specially concerning practice under *elegit*.

There are no rules of court specially relating to the practice under the writ of *elegit*. It is left to have the same force and effect as heretofore (*k*). We have already discussed certain rules which apply equally to writs of *fi. fa.* and of *elegit*, and to executions generally. To these we must refer the reader (*l*).

Conditions under which writ issues.

The Statute of Westminster gave a new remedy to judgment creditors. The writ, therefore, can only issue subject to the conditions laid down by, or to be implied from, the statute itself. There is nothing in law to prevent a creditor from issuing simultaneously all writs of execution which are available to him on the judgment or order being obtained. Notwithstanding the alternative terms of O. XLII. r. 17—that the person to whom the sum of money is payable shall "be enabled to sue out one or more writs of *fi. fa.*, *or* one or more writs of *elegit*,"—it is clear that such a person can issue out a *fi. fa.* and an *elegit* at the same time. The benefit, however, of both writs cannot, by the clear construction placed upon the statutes, be taken concurrently.

Simultaneous issue of *elegit* and *fi. fa.*

Creditor's option not in the issuing,

The creditor does not exercise his option by issuing either or both the writs; for we have seen that he was always at liberty to issue on his judgment all available writs of execution at once. The statute did not interfere with this

(*k*) O. XLIII. r. 1.

(*l*) Chaps. II. and IV. *supra*.

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right in any way, but gave a new remedy by enacting that the creditor might hold an estate in the land of the debtor in satisfaction of his debt, which is merely another way of saying, in the words of the statute itself, "until the debt be levied." The first election given to a creditor who has issued both writs, arises, therefore, when they come to be executed; he can then choose to levy his *fi. fa.*, or to take the land under the *elegit*. If he chooses the *fi. fa.*, and does not realise sufficient to satisfy his debt, he still has his election, and can take the remedy given him by the statute, and extend the land under an *elegit* (*m*). By the execution of the *fi. fa.*, the creditor has not had the *medietatem terræ*, which was the new thing that was to be delivered on the *elegit*, and which the statute designed should be a bar to the *fi. fa.* (*n*).

but, in the alternative, whether he will have the land.

Effect of bankruptcy of debtor upon this.

It is clear, therefore, that an execution creditor can levy under his *fi. fa.*, and then proceed for the balance by *elegit*. This is subject to the law of bankruptcy, and it appears, from the observations already made (*o*), that where part of the debt has been levied by seizure and sale under a *fi. fa.*, the execution creditor cannot, as against the trustee in bankruptcy of the execution debtor, retain the benefit of a writ of *elegit*, under which lands had been delivered within three months of the sale (*o*).

Execution finished by *elegit*.

Where the *elegit* is once executed, no other writ of execution can issue thereafter on the same judgment for the same debt (*p*). It is clear that the execution creditor can

(*m*) This has been expressed, not very clearly, "the election is between the writ of *fi. fa.* and holding the land; not between the writ of *fi. fa.* and the writ of *elegit*." See *Foster* v. *Jackson*, Hob. pp. 57, 58, and the notes to *Underhill* v. *Devereux*, 2 Saund. 68.

(*n*) Bacon, Abr. Execution, D.; Hob. 57.

(*o*) Sect. 45, Bank. Act, 1883, *vide supra*, p. 152.

(*p*) "The taking of the land in extent for the debt is, in judgment of law, as if he had taken a lease for years in satisfaction of his debt, and that is his full satisfaction in law, that although this execution is afterwards reversed, yet he shall not have any other execution." Coke, C. J., in *Crawley* v. *Lidgeat*, Cro. Jac. 338; see *Hele* v. *Bexley*, 17 Beav. 14.

issue simultaneously several writs of *elegit* into different counties, and for that purpose may divide his execution into several sums (*q*); but it was for a long time considered that he could not issue a second *elegit* either into the same or into a different county after the return of the first executed (*r*). Now, perhaps, he is enabled so to do by the express words of sect. 11 of 1 & 2 Vict. c. 110, above quoted, whereby the sheriff may deliver execution of *all lands* of which the execution debtor shall have been possessed at the time of entering up judgment, *or at any time afterwards* (*s*); but this does not interfere with the rule, that whatever land is delivered ultimately, whether under the same or a new writ, is delivered in satisfaction.

Query, whether he can issue second *elegit*.

Sect. 2.—The Duties of the Sheriff under the Writ and its Effect on Estates in Land.

The mandate in the writ is:—"Therefore we command you that without delay you cause to be delivered to the said A. B., by a reasonable [price or (*t*)] extent, all such lands, &c."

Material mandate in writ.

The first duty of the sheriff is to deliver to the creditor such lands of the judgment debtor as are subject to the writ (*u*). In order to ascertain what lands belong to the debtor, what estate he has therein, and the value thereof, the sheriff must hold an inquest (*x*). This is done by

The delivery.

The inquest.

(*q*) 2 Saund. 68 c. The "one or more writ or writs of *elegit*" of O. XLII. r. 17 (*vide supra*, p. 108), may be construed to mean this.

(*r*) 2 Saund. 68 d; Bac. Abr. tit. Execution (D). But, apparently, on the discovery of lands of the debtor, after the execution of the first writ, it was taken off the file and a new writ granted. *Lowthal* v. *Tomkins*, 2 Eq. Ca. Abr. p. 381.

(*s*) See 2 Saund. 68 c, note (*e*). It is, however, at least a doubtful point.

(*t*) 2 Saund. 68 g; Watson, Sher. 307 (*d*); Bank. Act, 1883, s. 146 (1), *supra*, p. 166.

(*u*) *Vide infra*, as to what lands are subject to the writ.

(*x*) Co. Litt. 289 b. See *Garraway* v. *Harrington*, Cro. Jac. 569.

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summoning a jury. The under-sheriff presides, and the proceedings are conducted as on an ordinary trial before a jury (*y*). It is not essential, however, that notice of the inquisition should be given to the judgment debtor (*z*), and the proceeding is practically an *ex parte* one, for the jury have no right to go into the question of title.

Evidence before the jury.

Therefore, where proof is given that the possession of the land is in the debtor, or that he is in receipt of the rents, there is *primâ facie* evidence of title in the defendant (*a*). The Court has the same jurisdiction over the finding of the jury in this case as in every other, and may set aside the verdict on grounds which would there be sufficient (*a*). Notwithstanding the broad statement that the jury has no right to go into a question of title, evidence can, it is submitted, be tendered before them as to the person who is the real owner of the land, otherwise third persons, such as mortgagees not in possession, might conceivably be injured by the verdict. There is, however, authority for the statement that a mortgagee cannot proceed summarily to set the verdict aside; he is relegated, apparently, to his action for recovery of possession (*b*) or for foreclosure.

What the delivery consists in.

The mandate that the sheriff "cause to be delivered" is not, as in the case of a writ of possession, literally fulfilled (*c*). All that the sheriff or under-sheriff in fact does, is to take notes of the evidence and the finding, and make

The return.

a return of the inquisition (*d*). The formalities necessary

(*y*) For the fees to which the sheriff is entitled, see Appendix III. *infra*, p. 471.

(*z*) *Steed* v. *Layner*, 2 Ld. Raym. 1382.

(*a*) 2 Wms. Saund. 214, n. (*z*); *Barnes* v. *Harding*, 1 C. B. N. S. 568. Where the verdict is set aside, a second inquisition can be held under the same writ. *Ibid.* If the inquisition is in itself a void proceeding, the Court will not interfere to set it aside. *Morris* v. *Jones*, 2 B. & C. 243; 3 Dowl. & R. 603; but see last case.

(*b*) *Cooper* v. *Gardner*, 3 A. & E. 211.

(*c*) "Under an *elegit* he [the sheriff] certainly could not deliver the lands extended." Kenyon, C. J., *Taylor* v. *Cole*, 3 T. R. p. 295. But if possession is delivered, the execution debtor cannot proceed by action to recover. *Jefferson* v. *Dawson*, 3 Keb. 243.

(*d*) In case the verdict is ques-

to a good return appear in the notes to the Appendix (*e*). When this return is made and filed of record, the execution creditor's title is complete under the writ. His title is, in fact, founded upon the inquisition, and the writ ought to be returned, to the intent that the Court shall judge of the sufficiency or insufficiency of that inquisition (*f*). The title of the execution creditor may, therefore, be considered incomplete until the return has been made (*g*). After the return, the title of the execution creditor is thereupon founded on, and derivative from, the title of the execution debtor, and is no better, nor has any greater effect, than his (*h*). The question of what is sufficient to complete the title of the execution creditor under the writ, and the question, what is a seizure of lands sufficient to complete the execution under sect. 45 of the Bankruptcy Act, 1883 (*i*), are different. As soon, apparently, as the inquisition is held, the execution is completed (*j*); but the title of the creditor requires that the return of the inquisition shall be filed (*k*). Where any of the parties to the inquisition die, or where their interest otherwise devolves, the case is subject to the general rules upon the matter, which we have already discussed (*l*).

Effect of delivery to execution creditor.

After the return setting forth the inquisition, the estate which the execution debtor has in the premises, and the

tioned, the sheriff is, apparently, bound to verify his notes. See course pursued in *Barnes* v. *Harding*, 1 C. B. N. S. 568.

(*e*) *Infra*, p. 415, Form 49.

(*f*) *Fulwood's case*, 4 Rep. 67 b. In other writs of execution which are the most final process, the return is unnecessary. *Casseldine* v. *Munday*, 2 Dowl. 169.

(*g*) *Hoe's case*, 5 Rep. 90 a; *Garraway* v. *Harrington*, Cro. Jac. 569.

(*h*) See judgment of Gibbs, C. J., *Rogers* v. *Pitcher*, 6 Taunt. 202, 206.

(*i*) This section is referred to more in detail, *supra*, p. 152.

(*j*) *Re Hobson*, 3 Ch. D. 492, where the suggestion of Bacon, V.-C., that a fit of apoplexy falling on the sheriff before he had time to return the writ might work injustice, is eminently characteristic.

(*k*) *Guest* v. *Cowbridge Rail. Co.*, L. R. 6 Eq. 619.

(*l*) *Vide supra*, p. 48 *et seq.*, and specially note (*r*), p. 54.

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When he may bring action to recover the land.

fact that he is in possession thereof, the execution creditor becomes tenant by *elegit*, and can bring ejectment. He cannot do so where the judgment debtor has himself no right of entry; for example, where the premises are let to a tenant (*m*). It was at one time said that a judgment in ejectment was an essential muniment of title of the tenant by *elegit*. This view is not in accordance, it is submitted, with principle, for any person who can maintain ejectment can enter peaceably (*n*).

Tenants of execution debtor.

Where the land is in the possession of tenants of the execution debtor, ejectment cannot be maintained as against them, but notice of the return of the inquisition should be given to them. The tenant by *elegit* can then maintain an action for use and occupation (*o*), or he can proceed by distress or action for the rent (*p*). He cannot, however, sustain an action for rent becoming due between the date of the writ and the inquisition (*q*).

Naturo of estates which may be taken under the writ.

The words of the statute and of the writ are, with regard to the interests in land which may be taken under it, of a most general nature. They do not of themselves confine the sheriff's duty to delivering any particular kind of land or any specified estate which the debtor may have in it. It is, however, always understood that (subject to statutory enactments as to equitable interests, which we

(*m*) *Rogers* v. *Pitcher*, 6 Taun. 202, 206.

(*n*) *Vide supra*, p. 99; *Rogers* v. *Pitcher*, 6 Taun. 202. This seems to be correct, on the ground, also, that the inquisition is final and conclusive between the parties. See *Martin* v. *Smith*, 27 L. J. Ex. 317.

(*o*) He must, of course, prove his title, which can be done by producing the record, or an office copy thereof, with the return duly filed. See *Ramsbottom* v. *Buckhurst*, 2 M. & S. 565. The tenant can dispute this title if he has any grounds; for example, by showing that the inquisition is false. *Harris* v. *Booker*, 4 Bing. 96; *Harris* v. *Pugh*, 4 Bing. 335.

(*p*) *Bishop of Bristol's case*, 3 Leo. 113. Attornment is not necessary. *Lloyd* v. *Davies*, 2 Exch. 103.

(*q*) *Sharp* v. *Key*, 8 M. & W. 379.

shall discuss) the execution debtor's estate must be a legal estate.

Prior equitable estate in third person.

The *elegit* creditor, similarly to every other execution creditor, takes subject to any equitable interest in the lands which may exist in any other person. The *elegit* is no bar to such interest. Where, therefore, lands, whereof the legal property is in the debtor, have been equitably mortgaged, the mortgagee may take proceedings to protect his interest, and will, as to his charge, rank before the *elegit* creditor (*r*). The latter, since he is not a purchaser, will be postponed, whether he has or has not had notice of the equitable mortgage before his execution (*s*).

The rights of the parties, where a claimant alleges an equitable estate against the tenant by *elegit*, cannot be worked out in the action in which the *elegit* has issued. Separate proceedings at the suit of the *elegit* creditor, or of the equitable mortgagees, must be taken, in the form of an action either for redemption or foreclosure, as the case may demand. Such proceedings are commenced by originating summons (*t*), and a sale may be obtained of the property in question under and subject to the provisions of sect. 25 of the Conveyancing Act, 1881 (*u*). We shall, in a subsequent Chapter, discuss, to the extent necessary for our subject, this section of the Conveyancing Act, and the creditor's remedy thereunder (*x*).

To return to the consideration of the different estates which are subject to the writ. The execution debtor may have in the land any of the numerous estates or interests known to the law, and this part of the subject will be best discussed under an enumeration of those estates.

Estates in fee.

Estates in Fee.—The debtor's interest only can be taken.

(*r*) *Whitworth* v. *Gaugain*, 3 Hare, 416. See *Hele* v. *Bexley*, 17 Beav. 14; *Potts* v. *Warwick & Birmingham Canal Navigation*, Kay, 142; *Stevens* v. *Mid Hants Ry. Co.*, L. R. 8 Ch. 1064.

(*s*) *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 492.

(*t*) O. LV. r. 5 a.

(*u*) 44 & 45 Vict. c. 41.

(*x*) *Vide infra*, p. 301.

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If, therefore, the land is let to tenants it is, as we have seen, delivered subject to their tenancies (*y*). Land which is held for a public purpose without a profit to the public body of persons holding it, is subject to execution by *elegit*, wherever judgment can be signed against that public body (*z*).

Estates tail.

Estates Tail.—Where the execution debtor is tenant in tail the lands can be delivered. Before the statute 1 & 2 Vict. c. 110, the issue in tail, claiming *per donatum*, could, as against the creditor, and after the death of the tenant in tail, avoid the execution (*a*). But since that statute it appears to be the better opinion that where there is a protector, the creditor can take under an *elegit* the same estate as the debtor could dispose of without the protector's consent, viz., a base fee. Where there is no protector, the creditor may, probably, take as if it were an estate in fee, the debtor having a disposing power without the assent of any other person. By sect. 13, the issue and remaindermen are expressly bound (*b*).

Effect of 1 & 2 Vict. c. 110, s. 13.

Life estates.

Estates for Life.—The interest of the execution debtor can here also be delivered. It would appear that the effect of delivering in execution of an estate for life has not been fully considered in the powers conferred on a tenant for life by the Settled Land Act, 1882. From the provisions of that Act, it seems that, notwithstanding the delivery by the sheriff, and even actual possession by the judgment

Settled Land Act, 1882.

(*y*) Reasoning of Bayley, J., in *Doe* d. *Phillips* v. *Evans*, 1 Cr. & M. p. 455.

(*z*) For example, a dock or waterworks company. *Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. L. 93; *Worral Waterworks Co.* v. *Lloyd*, L. R. 1 C. P. 719. As to the property of a union, see *Att.-Gen.* v. *Wilkinson*, 28 L. J. Ch. 392.

(*a*) *Ashburnham* v. *St. John*, Cro. Jac. 85. The case was on an extent under a statute.

(*b*) Prid. Judgments, p. 66. But it is at least arguable that this statement of the law is incorrect. The subject is referred to again *infra*, in the Chapter on Equitable Execution.

creditor, the tenant for life can sell the land the subject of the execution (*c*); for the execution creditor is protected only, if at all, by sect. 50, sub-sect. 3, and then has to be brought within the words "assignee for value of the estate or interest of the tenant for life" (*d*). If such a point were ever raised for discussion, it would be necessary, however, to consider the effect of sect. 11 of 1 & 2 Vict. c. 110, and (the land having been actually delivered in execution) of sect. 1 of 27 & 28 Vict. c. 112. From this point of view it would be submitted to be a reasonable construction of those enactments that a purchaser is bound to discharge every incumbrance of such a nature on the land.

Estate *pur autre vie.*

An estate *pur autre vie* is on principle extendible under the writ. It is a matter not likely to be of importance whether it is seizable as real or as personal estate. It is submitted that it should be taken as real estate, and that, therefore, the creditor should only take in it that limited interest, or conditional estate, which he takes in all freeholds, and not the absolute property, as in the case of chattel interests.

Reversion.

A reversion on a lease for lives or for years can be taken (*e*). The reason given by Gilbert, C. B., is that the intent of the writ extends to whatever lands and tenements were actually vested in the defendant, and reversions are comprised under the term *terræ*, since they are lands returning to the defendant when the particular estate ceases (*f*). On the reversion being delivered to him under

(*c*) 45 & 46 Vict. c. 38, s. 2, sub-ss. (5), (7).

(*d*) The word "assignment" in sect. 50 has a wide interpretation given to it (sub-s. (4)); but, bearing in mind that an execution creditor is not a purchaser for value (*vide infra*, p. 324), it is doubtful whether an execution creditor comes within the protection of the section.

(*e*) "For, to a remainder are no services due nor incident, and, therefore, it is termed seck; but a reversion has services incident, and those may be extended, and, by consequence, the reversion when it comes into possession." Vin. Abr. tit. Statute Merchant, P. 15, *in margin*. The return, to be formal, must not state that "a rent" has been delivered, but the reversion. *Walsal* v. *Heath*, Cro. Eliz. 656.

(*f*) Gilbert on Executions, 39.

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the inquisition, he becomes entitled, *ipso facto*, to sue and distrain for the rent as the judgment debtor might have done (*h*). A remainder cannot, however, be taken in execution under an *elegit*, either by virtue of the Statute of Westminster II. (*i*), or by virtue of sect. 11 of 1 & 2 Vict. c. 110 (*j*).

Remainder.

Joint estates.

Joint Tenancy.—It is said, "an estate in joint tenancy cannot be extended after the death of the joint tenant who acknowledged the judgment" (*k*), which evidently means that a joint tenant's estate cannot be extended after his death; for, *jus accrescendi præfertur oneribus*. If during the life of a joint tenant the land is extended, it operates as a severance of the joint tenancy, or at all events creates an estate in the creditor until his debt be levied (*l*). The fourth part of a house was, according to a very old authority, taken under an *elegit* (*m*). The return cannot, of course, set out the metes and bounds of the *elegit* debtor's interest, for the jury have no right so to do (*n*). The creditor must resort to an action of partition, to which he and all the joint tenants would be parties.

Coparcenary, or in common.

An estate in coparcenary, or in common, may be extended (*k*); and the same remarks apply as to the remedy of the execution creditor as were made in respect of estates in joint tenancy.

Disposing power of sect. 11 of

Debtor's disposing Power over Lands.—Now, as we have seen by sect. 11, above set forth, all lands, &c., over which

(*h*) *Bishop of Bristol's case*, 3 Leo. 113; *Lloyd* v. *Davies*, 2 Exch. 103.

(*i*) See note (*e*), *supra*.

(*j*) For the words there are "seised or possessed," and "a man cannot be seised or possessed of a remainder." *Re South*, 9 Ch. 369; see note (*e*), *supra*. The real remedy against a remainder is by action; it is charged under sect. 13 of 1 & 2 Vict. c. 112. *Vide infra*, p. 309.

(*k*) 2 Cru. Dig. 54.

(*l*) Gilb. on Ex. 41, 42.

(*m*) Bro. tit. *Elegit*, pl. 13.

(*n*) For Forms of return, see Appendix, *infra*, No. 49. The former necessity (before 1 & 2 Vict. c. 110) of setting out metes and bounds of the lands delivered, being only a moiety of that in the debtor's possession, arose from the Stat. *Elegit*, and authority was thereby given for the return. *Fenny* v. *Durrant*, 1 B. & Ald. 40; *Doe* d. *Roberts* v. *Parry*, 2 D. & L. 430.

the debtor "shall at the time of entering up the judgment, or at any time afterwards, have any disposing power, which he might, without the assent of any other person, exercise for his own benefit," are subjected to the writ.

1 & 2 Vict. c. 110.

These words have not been the subject of judicial discussion upon questions arising upon the execution of writs of *elegit*. The same words, however, occur in sect. 13 of the Act 1 & 2 Vict. c. 110, which section gives an equitable charge over the debtor's lands, and the effect of which we shall consider in the Chapter on Equitable Execution.

Construction of words "disposing power" in 1 & 2 Vict. c. 110, s. 13.

According to the decisions under that section, the words cover property over which the debtor had a right at law or in equity to consider himself the beneficial owner (*o*). The power of defeating a voluntary settlement by a subsequent sale for valuable consideration is not, therefore, a "disposing power" within this section (*p*). Again, the words "for his own benefit" have been construed as meaning "not as trustee" (*q*). It has also been held in Ireland that a married woman, having property settled to her separate use, with no restraint on anticipation, has no such disposing power as is contemplated by the section (*r*). It is suggested in a learned work that the words would prevent an *elegit* issued against a tenant in tail being disputed by the issue in tail (*s*).

Notwithstanding these *dicta* and opinions, it is difficult to see what the effect of delivering under an *elegit* land subject to a power—for example, to a general power of appointment—would be. The statute would, it is presumed, be construed to prevent a tenant by *elegit* being defeated by an execution of the power, subsequently to the delivery to him of the land (*t*).

(*o*) *Kinderley* v. *Jervis*, 22 Beav. 1.

(*p*) *Beavan* v. *Lord Oxford*, 6 De G. M. & G. 507, p. 522.

(*q*) *Arnold* v. *Mayor of Gravesend*, 2 K. & J. 574, p. 584.

(*r*) *Digby* v. *Irvine*, 6 Ir. Eq. Rep. 149.

(*s*) Prid. Judgments, 66.

(*t*) Before 1 & 2 Vict. c. 110, both at law and in equity, the execution of a general power of appointment by the debtor before the delivery of the land to the creditor, even though after judgment, de-

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Application of *elegit* to equitable estates under Statute of Frauds.

Hitherto, we have seen that the estate seizable under the statutes is a legal estate only, save and except the last-mentioned case, where the debtor might have no estate in land whatsoever, and yet be the appointor under such a power as is intended. The operation of the writ is not, however, confined wholly to legal interests in land. By the 10th section of the Statute of Frauds (*u*) it is enacted: "that, from the date therein mentioned, it shall and may be lawful for every sheriff, or other officer to whom any writ or precept is or shall be directed, at the suit of any person or persons, of, for, and upon any judgment, statute, or recognizance hereafter to be made or had, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, as any other person or persons be, in any manner of wise, seised or possessed, or hereafter shall be seised or possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution hereafter shall be so sued, had been seised of such lands, tenements, rectories, tithes, rents, or other hereditaments of such estate as they be seised of in trust for him at the time of the said execution sued, which lands, tenements, rectories, tithes, rents, and other hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed, freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued"(*x*).

Statute of Frauds, s. 10.

feated his title. *Doe* d. *Wigan* v. *Jones*, 10 B. & C. 459; *Skeeles* v. *Shearly*, 3 My. & Cr. 112; *Langton* v. *Horton*, 1 Hare, 549. The reasoning of those cases would apply equally where the execution had been actually completed by delivery and possession.

(*u*) 29 Car. II. c. 3.

(*x*) The remainder of the section relates to cases of death of *cestui que trust*, and makes his equitable interests assets by descent. Such interests as were under this statute seizable by the sheriff became, *ipso facto*, assets at law in the hands of the heir. *Plunkett* v. *Penson*, 2 Atk. 290, p. 293; *King* v. *Ballett*, 2 Vern. 248.

Sect. 11 of 1 & 2 Vict. c. 110, as to trust estates.

The words of sect. 11 of 1 & 2 Vict. c. 110, "or any person in trust for him," and their context, impose no limitation as to the kind of equitable estate which can be delivered under an *elegit*. From the terms of these two enactments alone, it would appear that legal and equitable estates of all kinds are equally subject to the writ. Such, however, is not the case. Limitations have been placed upon the natural construction above suggested, for the reason that the sheriff has no available means for ascertaining the existence of any but the simplest equitable estate (*y*). In the first place, the trust must be an express trust. The inquest could not inquire into the nature of any implied or resulting trust, nor give a verdict thereon. Again, where there is a mortgage upon any interest in land, and the execution debtor is the owner of the equity of redemption, his interest cannot be seized under an *elegit* (*z*). Where the mortgage is made by a term of years, the debtor's reversion thereupon, as upon any other term of years, can be taken (*a*).

Trust must be express.

Equity of redemption.

Sect. 10 extends to more than mere trust in fee.

It is said, generally, that the 10th section extends only to a trust of land in fee (*b*); but the authority given for this does not warrant the proposition (*c*). There seems no

(*y*) *Scott* v. *Scholey*, 8 East, p. 485. Since the old action of ejectment has been replaced by the action for recovery of land (as to which *vide supra*, p. 98), an action may doubtless be always brought upon the inquisition and return; but formerly the delivery under *elegit* of any equitable interest must have given rise to difficulty. The sheriff does not deliver actual possession, and no ejectment could be brought in respect of an equitable estate. See the point raised in *Doe* d. *Hull* v. *Greenhill*, 4 B. & Ald. 684. The execution creditor, if he had any remedy in such a case, must have sought relief in equity.

(*z*) *Lyster* v. *Dolland*, 3 Br. C. C. 478, better reported 1 Ves. jun. 431; *Plunkett* v. *Penson*, 2 Atk. p. 292. See *Scott* v. *Scholey*, 8 East, 467; *Hatton* v. *Haywood*, 9 Ch. 229. After an *elegit* was issued, and *nihil* returned, the creditor might bring his bill for redemption. *Vide infra*, p. 308. On consent of the mortgagee the Court has ordered a sale. *The King* v. *De la Motte*, Forr. 162.

(*a*) *Mayor of Poole* v. *Whitt*, 15 M. & W. 571. See *Doe* d. *Phillips* v. *Evans*, 1 Cr. & M. 450.

(*b*) 2 Saund. 11 a.

(*c*) *King* v. *Ballett*, 2 Vern. 248.

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reason why a simple trust estate for life, for example, should not be subject to the writ as well as a trust in fee (*d*).

Trust of a term cannot be taken.

Another limitation placed upon the natural meaning of the statutes is, that the trust of a term cannot be taken; but this is not by any means clear (*e*). The rules on this point apply equally to writs of *elegit* and *fi. fa.* (*f*).

Judicial construction of sect. 10.

A fairly comprehensible statement is, it is submitted, that of Abbott, C. J., in *Doe* d. *Hull* v. *Greenhill* (*g*). "This statute" (Statute of Frauds) "made a change in the common law, and, up to a certain extent at least, made a trust the subject of enquiry and cognizance in a legal proceeding. We think that the trust that is to be thus treated must be a clear and simple trust for the benefit of the debtor; the object of the statute appearing to us to be merely to remove the technical objection arising from the interest in land being legally vested in another person, where it is so vested for the benefit of the debtor." Another view is that of Vice-Chancellor Sir John Leach: "A judgment creditor has at law, by the Statute of Frauds, execution against the equitable freehold estate of the debtor in the hands of his trustee, provided the debtor has the whole beneficial interest; but if he has left a

(*d*) *Hele* v. *Bexley*, 17 Beav. 14. Where the life estate was an equitable interest, subject to a condition, in leaseholds, it was said that the sheriff's return to an *elegit* would have been *nil*. *In re Duke of Newcastle*, L. R. 8 Eq. 700. The reasoning on the construction of these statutes appears unsatisfactory, probably because of the greater convenience of the remedy in equity.

(*e*) *Scott* v. *Scholey*, 8 East, 467, case under a *fi. fa.* However, the judges, in *Doe* d. *Hull* v. *Greenhill*, 4 B. & Ald. 684, do not appear to have seen the objection, if objection it be, that the trust of a term could not be taken. The language of the V.-C., in *Forth* v. *Duke of Norfolk*, 4 Mad. p. 504, seems to exclude from the subjects liable to execution, under the *elegit*, any equitable interest, except in freeholds. And see *Gore* v. *Bowser*, 24 L. J. Ch. 315, 440. *Doe* d. *Phillips* v. *Evans*, 1 Cr. & M. 450, appears to be a distinct authority that a term in trust to attend the inheritance can be seized under an *elegit*. See, also, *Hele* v. *Bexley*, 17 Beav. 14.

(*f*) *Vide supra*, pp. 129, 136.

(*g*) 4 B. & Ald. p. 690.

partial interest only in his equitable freehold estate, the judgment creditor has no execution at law, though he may come into a Court of equity, and claim there the same satisfaction out of the equitable interest as he would be entitled to at law if it were legal" (*h*). In any case it seems clear that there are no legal means to perfect the execution if levied over an equitable interest. The creditor must have recourse to the equitable jurisdiction of the High Court.

Terms of years.

Chattel interests in land are seizable under an *elegit*. The effect, however, of their delivery under this writ to the execution creditor is so different from the delivery of freehold estates, that the consideration thereof is postponed for a few pages.

Copyholds.

Copyholds and Lands of Customary Tenure.—Before 1 & 2 Vict. c. 110, these were not subject to execution at all (*i*). The effect under the Act seems peculiar, for the creditor is made liable for the fines, &c. recoverable in the ordinary course from the tenant. It does not appear that the execution operates in any way as a conveyance to the creditor. He is not apparently admitted, for, if he were, the estate he would hold would be probably inconsistent with the custom of the manor.

Estate taken by execution creditor.

The Estate taken by the Execution Creditor.—Where the writ has been executed by inquisition and return, the creditor becomes entitled to an estate in his debtor's land. This estate is expressed in the words of the writ:—"To hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ , together with interest as aforesaid, shall have been levied."

(*h*) *Forth* v. *Duke of Norfolk*, 4 Mad. p. 504. For an example of the kind of equitable interest which is not deliverable, see *Harris* v. *Booker*, 4 Bing. 96.

(*i*) Vin. Abr. Copyhold (O. e.), pl. 6; 2 Eq. Ca. Abr. 226, pl. 6.

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Basis of creditor's estate.

Conditional estate.

The estate taken by the execution creditor is based upon the record, *i. e.*, the judgment, *elegit* and return of the inquisition (*k*). Blackstone classifies the estate as a fourth species of conditional estate created by operation of law (*l*). It is exceptional altogether, and is more fully described by Lord Coke: "These tenants have uncertain interests in lands and tenements, and yet they have but chattels, and no freeholds, because, although they may hold an estate of inheritance or for life *ut liberum tenementum* (*m*) until their debt be paid, yet it shall go to their executors, for *ut* is similitudinary; and though to recover their estates they shall have the same remedy as a tenant of the freehold shall have, yet it is but the similitude of a freehold, and *nullum simile est idem*" (*n*). The estate of the creditor being a conditional estate, the debtor has no *reversion* (*o*). The estate is, of course, subject to the incidents of tenure of the debtor's estate.

Length of time for which estate continues.

The land being delivered to the creditor at an appraised annual value, and the period at which his estate begins to run being fixed, it can always be ascertained for what length of time that estate will continue, and the debtor, at the expiration thereof, can get back his land, notwithstanding that, by any means for which he, the creditor, is not responsible, the amount has not, in fact, been levied (*p*).

(*k*) *Garraway* v. *Harrington*, Cro. Jac. 569, result of resolutions in *Fulwood's case*, 4 Rep. 67 a. See a strange effect of this, of archæological interest only, 2 Wms. Saund. p. 261.

(*l*) 2 Comm. ed. 1876, 136.

(*m*) These words are no longer in the writ.

(*n*) 2 Bl. Comm. ed. 1876, p. 137.

(*o*) *Carter* v. *Hughes*, 2 H. & N. 714.

(*p*) The words in the writ "to hold the said lands, &c., until the two several sums, &c. shall have been levied," would doubtless be read as strictly as their counterpart "*quousque debitum fuerit levatum*," and on the expiration of the definite term so ascertained, the debtor could recover the land. *Sir Andrew Corbet's case*, 4 Rep. 82 a, from which respectable authority it further appears that "if tenant by *elegit* is interrupted in taking the profits of the land by reason of war, he shall not hold over, but it shall be to the disadvantage of the tenant by *elegit*." See 2 Wms. Saund. 59.

The remedy of the debtor at the expiration of this fixed period is by action of ejectment, to which there is no defence except act of the debtor (*q*).

Accounting between debtor and *elegit* creditor in possession.

The amount remaining due under the writ can at any time be ascertained. The execution debtor may issue for that purpose a summons in the action. On the summons an order will be made that possession be re-delivered to the debtor (*r*) on payment of the amount found to be due (*s*). An account is taken on the basis that the execution creditor is bound to account as if he were a mortgagee in possession (*t*). This renders him liable, and he will therefore be charged with such sums as he might, but for his wilful default, have received (*u*).

Interest.

The tenant by *elegit* is now allowed, by the terms of the writ itself, which is directed to the levying both of the judgment debt and costs, interest on both these sums; formerly, by the doctrines of equity (*x*), he was entitled to levy or

(*q*) Tidd's Pr. 1037. The debtor could, and apparently can still, proceed at any time by action of *scire facias rehabendum terram* or *ad computandum*. In this action he could tender in Court the sum remaining due on the judgment. 2 Roll. Abr. 482, tit. I.; 2 Wms. Saund. 261. This is one of the few instances where a right to a *scire facias* now exists, but the remedy is obsolete by reason of the modern system of parties accounting in chambers; *q. v. infra.*

(*r*) Principle stated in *Yates* v. *Hambly*, 2 Atk. p. 363.

(*s*) Forms of summons and order for accounts in Appendix, *infra*, Nos. 50, 51. The remedy of the debtor was formerly three-fold; a *sci. fa.*, as has been mentioned in a former note; a rule referring to the master to take an account (*Price* v. *Varney*, 3 B. & C. 733); or, for an account in equity. Tidd's Pr. 1037.

(*t*) Sect. 11 of 1 & 2 Vict. c. 110. Before that statute the *elegit* creditor was always bound to account in equity. *Hale* v. *Thomas*, 1 Vern. 349; *Godfrey* v. *Watson*, 3 Atk. 517. The common law Courts would refuse a reference to a master where complex matters of account were brought into question, thus forcing the parties into equity. *O'Brien* v. *Goold*, Alc. & Na. 41.

(*u*) *Bull* v. *Faulkner*, 1 De G. & S. 685, where see form of order to account. In the report of this case (12 Jur. 33) it is said that search had been made for precedent of such a decree before the Act of 1 & 2 Vict. c. 110; but none such were found. In fact, before that statute, there is a case in Ireland where the decree being asked for was refused. *Holton* v. *Lloyd*, 1 Mol. 30.

(*x*) *Godfrey* v. *Watson*, 3 Atk. 517.

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Creditor in position of mortgagee.

obtain in account interest on his judgment debt. The *elegit* creditor is, for the purposes of his security obtained on his judgment, in the same position as a mortgagee under a mortgage containing similar terms to those of the writ (*y*). It is hardly necessary to add that, irrespective of the express provision now made by the terms of the writ itself, the *elegit* creditor can, where the account is being taken against him, add his costs to his judgment debt, just as can a mortgagee in possession (*z*). The lands are usually appraised by the jury at a sum below their value.

Costs.

Usual appraisement.

Terms of years.

Chattel Interests of the Execution Creditor in Land.—When the sheriff enforces the writ against land, whereof the debtor is lessee for years, the effect is entirely different from what it is when the land is freehold. For the sheriff may, under the statute, either extend a term of years, that is, may deliver a moiety thereof (now the whole) to the plaintiff or conusee, or sell the whole term, as part of the personal estate, to the plaintiff, at a gross price to be ascertained by the jury (*a*). It is thus at the election of the sheriff, who acts on the suggestion of the execution creditor, either to extend or to sell a lease, so long as it remains in the debtor's hands (*b*). The creditor to whom a term is thus sold or assigned (*c*) becomes the absolute owner of it (*d*), at the sum at which it has been appraised. He is not liable in such a case to account to anyone, certainly not at law, nor, on principle, can he be in equity. Where, however, a judgment was reversed after a term had in this

Creditor absolute owner.

(*y*) See *Williams* v. *Price*, 1 S. & S. 581; *Mayer* v. *Murray*, 8 Ch. D. 424.

(*z*) *Yates* v. *Hambly*, 2 Atk. 360.

(*a*) 2 Saund. 68 g. A term of years, in trust to attend the inheritance, can be seized. *Doe* d. *Phillips* v. *Evans*, 1 Cr. & M. 450. Sect. 146, Bankruptcy Act, 1883, does not prevent the *elegit* extending to terms of years. *Richardson* v. *Webb*, 1 Mor. B. R. 40.

(*b*) *Fleetwood's case*, 8 Rep. 171 a.

(*c*) It is submitted that in this case the assignment is the filed return of the inquisition; that is, it is an assignment "of record."

(*d*) *Comyn* v. *Brandlyn*, Moore, 873.

manner been transferred to the plaintiff, a writ of restitution was awarded as between the parties to that action, the sale being no sale (*e*).

Writ of restitution on reversal of judgment.

The inquisition and return form the basis of the *elegit* creditor's title, so that where the jury found that the debtor was possessed of one term, which the sheriff sold to the creditor, the sale was held void, although the debtor was possessed of another and different term (*f*).

Equitable interests in leaseholds.

We have already seen that the extent to which equitable interests in leaseholds are seizable in execution by writ is doubtful (*ff*); and, in deference to such authority as exists, it would appear wise for the creditor to proceed to his equitable remedy.

Certificate of taxation.

The parenthetical directions given in the form to insert the date of certificate of taxation are not reliable. The execution creditor can, on signing judgment (*g*), immediately issue a writ of *elegit* for the amount thereof, and need not wait for the certificate of taxation; for, as we have seen, he is entitled, provided he does so within eight days after the first writ, to issue a second writ for the amount of his costs (*h*).

(*e*) *Goodyere* v. *Ince*, Cro. Jac. 246, where the essential difference between a sale to a stranger under a *fi. fa.*, and a delivery at an appraised value under *elegit*, is mentioned. Note to *Doe* d. *Emmett* v. *Thorn*, 1 M. & S. p. 427.

(*f*) *Palmer's case*, 4 Rep. 74 a; *S. C.*, *sub nom.*, *Palmer* v. *Humphrey*, Cro. Eliz. 584.

(*ff*) *Vide supra*, pp. 129, 136; *Scott* v. *Scholey*, 8 East, 467; *Gore* v. *Bowser*, 24 L. J. Ch. 316, 440.

(*g*) The words "entering up judgment" in the 1 & 2 Vict. c. 110, mean signing judgment. *Fisher* v. *Dudding*, 3 Man. & Gr. 238.

(*h*) O. XLII. r. 18, *supra*, p. 109.

Sect. 3.—The Effect of certain Statutes on the Right of Judgment Creditors with respect to Land.

What lands of debtor to be taken.

Taking up the words of the writ from the place where they describe what kind of lands the sheriff is authorized to seize, they follow on:—"As the said C. D., or any person or persons in trust for him, was or were seised or possessed of on the said day of [*the date of the certificate of taxation*], or at any time afterwards, or over which the said C. D. on the said day of [*the date of the certificate of taxation*], or at any time afterwards, had any disposing power, &c."

Construction of Stat. *Elegit* as to lands being extendible, irrespective of when acquired.

The somewhat harsh (*i*) construction placed upon the Stat. *Elegit*, and the consequent terms of sect. 11 of 1 & 2 Vict. c. 110, with reference to the estate which could be taken under the writ, rendered liable to execution all lands which the debtor had at the time of the judgment. They were liable to be seized, notwithstanding that they had been alienated at the time of execution (*k*). Lands purchased after the date of the judgment, whether the debtor had or had not alienated them at the date of execution, were also liable in the same way (*l*).

Registration of judgments.

This necessarily rendered the title of purchasers most precarious, as an unsatisfied judgment, in existence at the date of the conveyance to them, might always be levied against the land. A number of statutes have at different times been passed to form and regulate a system of registration of judgments for the protection of purchasers,

(*i*) Williams' Real Property, 15th ed. 109.

(*k*) *Lillingston's case*, 7 Rep. 39 a.

(*l*) *Sir John de Moleyn's case*, Y. B. 30 Ed. iii. 24 a; 1 Roll. Abr. 892, pl. 14 and 16. A judgment was said to bind (2 Cru. Dig. 49), or to become a lien upon freehold lands; but is not a charge thereon so as to enable the creditor to buy in first mortgage and tack. *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 492; 3 Prest. Abstr. 323. The phrase "general lien" was used. Prid. Judgm. 9, and Brett, L. J., suggests that the best phrase was "a sort of general lien." *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. p. 289.

mortgagees and creditors. With these in this place we have but little to do. The registration, or non-registration of a judgment never affected the position of the execution creditor who had actually seized the lands of his debtor (*m*). The delivery of the land to him was a conveyance to him, which, when once completed, the owner thereof could not displace by any act of his own. If, however, the judgment were not registered in compliance with the various enactments, the judgment creditor stood the risk, until the execution was actually made, of the intervening title of a purchaser or mortgagee from the debtor.

Effect of non-registration on creditor.

This was the case, notwithstanding the terms of sect. 11, and of the writ above referred to, which apparently empower the sheriff to seize all lands, at the signing of the judgment or afterwards, the property of the debtor.

It has now been enacted, that no judgment, statute, or recognizance to be entered up after the date of the Act (29th July, 1864), shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other legal authority, in pursuance of such judgment, statute, or recognizance (*n*).

27 & 28 Vict. c. 112, s. 1.

The joint effect of this enactment upon sect. 11, above quoted, and the rights of the creditor under a judgment, are somewhat uncertain and undetermined. It is clear that, before 29th July, 1864, an execution creditor claiming under his judgment could be defeated only by purchasers, mortgagees, or creditors subsequently obtaining judgment and registering the same, or levying execution.

Effect of this Act.

Upon one construction of these conflicting enactments it would appear that now it is actual execution alone which affects land, and that, therefore, the words of the writ, and of the statute of 1 & 2 Vict. c. 110, s. 11, which we have

One construction to be placed upon sect. 1 of 27 & 28 Vict. c. 112.

(*m*) The decision in the recent case of *In re Pope*, 17 Q. B. D. 743, may be taken as a recognition of this conclusion.

(*n*) 27 & 28 Vict. c. 112, s. 1.

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been discussing, are useless as being practically repealed. Such a construction would place the execution creditor in a much worse position than that in which he formerly was, because his only right to enter upon lands which the debtor had, since the date of the judgment, fraudulently or voluntarily conveyed to third persons, would depend upon the difficult and abstruse law arising out of the statute 13 Eliz. c. 5. Such a result changes the position of the execution creditor, for the reason that it throws upon him the onus of proving that the conveyance he complains of is bad, whereas, but for sect. 1 of 27 & 28 Vict. c. 112, it was, if voluntary, at any rate of no avail, apart altogether from registration of the judgment.

The importance of a reliable judicial construction of these two statutes, sect. 11 of 1 & 2 Vict. c. 110, and sect. 1 of 27 & 28 Vict. c. 112, is undeniable from a most practical point of view. Until the subject is cleared of its difficulties, it is impossible to say for certain whether the writ, in its present form, does or does not direct the sheriff to perform a duty at variance with the rights of the execution creditor; whether, in fact, the mandate of the writ we are discussing is or is not in this particular wholly wrong. This will appear at once if we consider what is the question to be decided by the jurors on the inquisition. If the inquiry before the jury is "what lands had the debtor at the date of the judgment," it is clear that, notwithstanding 27 & 28 Vict. c. 112, the judgment does "affect" land before it has been delivered in execution. This view would appear to be in accordance with the opinion of Brett, J., who seems to think the first section does not limit the jurisdiction of the Court to consider the "sort of general lien" given by the judgment as still subsisting (*p*). The whole question is singularly obscure.

Registration of judgment and writ.

By sect. 1 of 23 & 24 Vict. c. 38, the registration of the

(*p*) *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275, p. 289; 47 L. J. Ch. 833, p. 838.

judgment and of the writ of execution was rendered necessary before the judgment could "affect" any land; and this enactment is amended as to the method of registration (the registration of the judgment being done away with, and the writ being registered thereunder in the name of the person against whom it is issued) by sect. 3 of 27 & 28 Vict. c. 112 (*q*). These enactments have, however, nothing to do with the mere execution on a judgment.

The statutable charge given by sect. 13 of 1 & 2 Vict. c. 110, distinct from execution under *elegit*.

We shall, in a subsequent Chapter, when we come to deal with the question of the equitable remedies of the judgment creditor, discuss the effect of the statutable charge given by sect. 13 of 1 & 2 Vict. c. 110, and we reserve the further discussion of sect. 1 of 27 & 28 Vict. c. 112 till then. In the same place we shall endeavour to show the effect of sect. 4 of the last-mentioned Act, which enacts that the creditor to whom land shall have been actually delivered in execution, may obtain, by petition to the Chancery Division, an order for the sale of such land.

Priority of competing writs of *elegit*.

The statutes to which we have in this section referred have particular application and effect in deciding the question of priority between competing creditors who have issued writs of *elegit*. The sheriff, it is said, must give priority to the one of two writs in his hands, which is on the first judgment in point of date (*r*).

Many questions which arise in like case under the writ of *fieri facias* cannot arise here, for the reason that the *elegit* creditor, who executes his writ, takes the land in satisfaction of his debt. The debtor's remaining interest or estate in such case is not a *tenement* within the meaning of the Statute of Westminster II., and cannot be taken

(*q*) A contention, based upon the wording of this section, that the registration of a writ of *elegit* must precede the delivery in execution under it, was disposed of in *Champneys* v. *Burland*, 19 W. R. 148.

(*r*) Lord Campbell, C. J., in *Sturgis* v. *Bishop of London*, 7 El. & Bl. at p. 554.

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under a second writ (*s*). It has been further decided that, notwithstanding the entering up and registration of the judgment, as required by 1 & 2 Vict. c. 110, and the charge given thereby, writs of *elegit* rank in the order in which they are delivered to the sheriff (*t*).

The Bankruptcy Act, 1883.

The effect of the 146th section of the Bankruptcy Act, enacting that the writ of *elegit* shall not extend to goods, deserves some notice. Before that Act, by issuing an *elegit*, a creditor obtained in execution both his debtor's lands and goods (*u*). Now, there is no writ whereby the creditor can do this; he must proceed by two writs, of *fi. fa.* and of *elegit*. We have seen that because the writ still depends upon the alternative enactment of the Statute Westminster II., the creditor cannot issue an *elegit*, first, taking the lands under it, and then proceed to issue a *fi. fa.* The law is still good that he has exercised his election in taking the land, and with that he must rest satisfied. If he takes the course of issuing a *fi. fa.* and levying thereunder, and after sale finds that he is still deficient, he may issue an *elegit* against the debtor's land. He will, however, take this course at his risk; for he has already notice of an act of bankruptcy, viz., the sale under his own writ of *fi. fa.* (*x*); and the delivery of the land to him may, at any time within three months of the sale, be rendered nugatory by the bankruptcy of the debtor (*y*).

Elegit the safer execution.

The conclusion to be drawn from this is, that against a person having both the legal estate in land and the goods, it is safer to issue an *elegit* against the land. Once the inquisition taken, the seizure is effected, and cannot be set aside by the bankruptcy of the debtor. The execution

(*s*) *Carter* v. *Hughes*, 2 H. & N. 719.

(*t*) *Guest* v. *Cowbridge Rail. Co.*, L. R. 6 Eq. 619.

(*u*) And became thereby a secured creditor. *Ex parte Abbott*, *Re Gourlay*, 15 Ch. D. 447.

(*x*) 46 & 47 Vict. c. 52, s. 4.

(*y*) A most likely contingency when all his property had been seized.

being completed by seizure, is protected against any available act of bankruptcy of which the creditor had not notice, and also against a subsequent bankruptcy of the debtor at any time (*z*).

Appointment of receiver.

It is suggested in a subsequent chapter that the effect of the *elegit* before the Bankruptcy Act, 1883, in making the creditor a secured creditor, and seizing both the debtor's lands and goods, may still be in certain cases attained by the appointment of a receiver (*a*).

Sect. 4.—The Sheriff's Right to Poundage and Expenses of Execution—Costs.

Poundage on *elegit*.

The statute 28 Eliz. c. 4, already discussed, although repealed (*b*), applies, so far as the right to poundage is concerned, to writs of *elegit*, so that the sheriff has a right to poundage on executing them (*c*). The statute appears to give poundage upon the debt for which the lands are delivered in execution (*d*), and a doubt was early entertained as to it (*e*). However, on a forced construction of the stat. 3 Geo. 1, c. 15, s. 16, which in terms applied only to writs for recovery of land, the sheriff has been held entitled to poundage on the yearly value only (*f*).

Sheriff's fees.

The fees to which the sheriff is entitled, besides poundage, were given by the table of fees prepared in pursuance of the stat. 1 Vict. c. 55, which will be found in the Appendix (*g*).

Costs.

The writ of *elegit* authorises the delivery of the land in execution for the amount of the judgment and costs

(*z*) 46 & 47 Vict. c. 52, s. 45.

(*a*) *Vide infra*, Book III. Chap. I. sect. 3.

(*b*) *Supra*, p. 156.

(*c*) *Carter* v. *Hughes*, 2 H. & N. 714.

(*d*) As to words "deliver in execution," see *Mortimore* v. *Cragg*, 3 C. P. D. p. 218.

(*e*) *Peacock* v. *Harris*, Salk. 331.

(*f*) *Nash* v. *Allen*, 1 Dav. & M. 16; *Tyson* v. *Paske*, 2 Ld. Raym. 1212; *S. C.*, Salk. 333.

(*g*) *Infra*, Appendix III. p. 471.

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thereof only. There is nothing in the writ authorizing the execution creditor to hold the lands for the costs of execution. These costs, especially if the inquisition has been lengthy, may be of considerable amount, and the recovery of them a matter of importance. O. XLII. r. 15, which empowers the party entitled to execution to levy the poundage fees and expenses of execution over and above the sum recovered, only extends to the sheriff's fees, and does not give him a right to recover the costs of the inquisition as between solicitor and client or party and party (*g*). The execution creditor cannot obtain upon summons an order for taxation of these costs and addition thereof to the judgment debt (*h*). It is, perhaps, a question whether those costs were at law recoverable at all (*i*). On the principle, however, on which accounts are taken between the execution debtor and the *elegit* creditor, it is submitted that the lands would not be ordered to be re-delivered until these costs had been provided for (*k*).

Costs of inquisition.

The sheriff, immediately he has executed the writ, has the right to recover his poundage and fees, so that the execution creditor must, if they are demanded, pay him, and then levy them out of the profits of the land.

Execution creditor liable for poundage.

(*g*) *Porter* v. *Wotton*, 28 Sol. Jour. 548.

(*h*) *Mahon* v. *Miles*, 30 W. R. 123.

(*i*) They hardly appear to be costs of suit within even the wide interpretation placed on the Statute of Gloucester (6 Edw. 1, c. 1). See 2nd Inst. 288. The doubt is implied in the judgment, 45 L. T. p. 541.

(*k*) *Godfrey* v. *Watson*, 3 Atk. 517; *Yates* v. *Hambly*, 2 Atk. 360. *Vide supra*, p. 185.

CHAPTER VI.

THE WRIT OF DELIVERY.

We have seen that by O. XLII. r. 6, a judgment for the recovery of any property, other than land or money, may be enforced by a writ for delivery of the property. O. XLII. r. 6.

At common law the remedy for recovery of a chattel was by action of detinue. The judgment was in the form that the plaintiff do recover from the defendant the said goods, or if the defendant should not render the same to the plaintiff, the value thereof, and also the damages by the plaintiff sustained by reason of the detention thereof. Upon this judgment no execution was issuable for the thing detained, but a writ of *distringas* was awarded under which the sheriff distrained upon the goods and chattels of the defendant, and so compelled him either to deliver to the plaintiff the thing detained or the value and damages. It was at the defendant's option which course he would take. Instead of a writ of *distringas* the plaintiff might issue a writ of *fi. fa.* for the amount of the damages and costs, in which case, if the sum was levied, the judgment was satisfied (*a*). Judgment in detinue.

In equity, however, the case was different. Wherever a chattel had a peculiar value, and wherever the contractual or other relationship between the parties was such that the Court would entertain a suit with respect to a chattel, a decree might be obtained enjoining its delivery specifically into the hands of the party (*b*). Decree for delivery of specific chattel.

(*a*) See course pursued in *Brinsmead* v. *Harrison*, L. R. 7 C. P. 547.

(*b*) *Pusey* v. *Pusey*, 1 Vern. 273; *Duke of Somerset* v. *Cookson*, 3 P. Wms. 389; and the notes to these cases in 1 W. & T. L. C. 6th ed. 961.

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Writ of delivery under Common Law Procedure Act, 1854, and Mercantile Law Amendment Act, 1856.

The power of the Courts of common law was extended by sect. 78 of the Common Law Procedure Act, 1854 (*c*), the short effect of which was to enable judges to order, in an action of detinue, execution to issue for the return of the chattel detained; but the section did not give them the power to attach the person of the defendant which was incident to the jurisdiction in equity. Further, express statutable jurisdiction has been given to pronounce a judgment for delivery of specific goods where they are the subject of a contract to deliver for a price in money, and to order a writ for their recovery to issue on such judgment (*d*).

O. XLVIII. r. 1.

Sect. 78 of the Common Law Procedure Act above mentioned, has been substantially reproduced by O. XLVIII. r. 1, which is as follows:—"Where it is sought to enforce a judgment or order for the recovery of any property other than land or money by writ of *delivery*, the Court or a judge may, upon the application of the plaintiff, order that execution shall issue for the delivery of the property without giving the defendant the option, if retaining the property, upon paying the value assessed of any, and that if the property cannot be found, and unless the Court or a judge shall otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the sheriff's bailiwick till the defendant deliver the property, or, at the option of the plaintiff, that the sheriff cause to be made of the defendant's goods the assessed value, if any, of the property."

In the execution of this writ the sheriff, if he can find the property, seizes it and delivers it to the plaintiff.

Assessment of value of goods necessary.

Before the Judicature Acts, and under the above-mentioned sect. 78, it was decided that the writ of *delivery* could not be ordered to issue until a verdict had been given assessing the value of the chattel (*e*). Since the Acts, where in an

(*c*) 17 & 18 Vict. c. 125, now repealed, 46 & 47 Vict. c. 49.

(*d*) 19 & 20 Vict. c. 97, s. 2, Mercantile Law Amendment Act, 1856.

(*e*) *Chilton* v. *Carrington*, 15 C. B.

O. XIII. r. 5.

action for detention interlocutory judgment in default of appearance had been signed under O. XIII. r. 5, an application for a writ of delivery was refused on the ground that the writ of inquiry prescribed by the rule for the purpose of assessing the value had not been issued (*f*). These decisions illustrate the nature of the writ, and, it is submitted, show that it is applicable only to enforce a judgment for recovery of a chattel when such judgment is the counter-part of that in an action of detinue at common law. The writ was not framed for the enforcement of orders in equity for the delivery of specific articles (*g*).

Effect of judgment on property in goods.

The writ of delivery does not, of course, affect the property in the thing recovered. It is under the judgment or order, and not under the writ, that the plaintiff's title to the property in question arises, or rather is authenticated and recorded. The effect of a judgment in detinue is said to be that the goods recovered remain the plaintiff's until he proceeds for the damages, instead of applying for a writ of delivery. Until execution has issued, a judgment creditor, in an action of detinue, is unable to get satisfaction, and the property in the goods remains in him (*h*).

Distress under writ of delivery.

We have already mentioned the writ of *distringas nuper vicecomitem* (*i*). What we have there stated with regard to the practice on that writ will apply *mutatis mutandis* to the remedy of distress under the writ of delivery.

O. XLVIII. r. 2. Form of writ

By O. XLVIII. r. 2, "A writ of delivery shall be in the form No. 10 in Appendix H., and when a writ of delivery

730; 24 L. J. C. P. 78. Such a verdict is the only one which a jury could return in favour of the plaintiff, and no question of option in the defendant could arise till after verdict. See, as to the form taken by the judgment in detinue, *Phillips* v. *Jones*, 19 L. J. Q. B. 374.

(*f*) *Corbett* v. *Lewin*, W. N. 1884, 62. See *Ivory* v. *Cruickshank*, W. N. 1875, 249.

(*g*) From the wording of rule 1 of O. XLVIII., it certainly appears to have been in the contemplation of its framers, that the property might not in some cases have been assessed when the writ could nevertheless issue.

(*h*) *Re Scarth*, L. R. 10 Ch. 234; *Brinsmead* v. *Harrison*, L. R. 7 C. P. 547; *Ex parte Drake, Re Ware*, 5 Ch. D. 866.

(*i*) *Supra*, p. 145.

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and separate writ for damages.

is issued the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages and costs awarded and interest.

The different forms of the writ will be found in the Appendix (*k*). It will be observed from them, that the old procedure by way of writ of *distringas* incorporated in the form now in use is still available for compelling the return of the goods, but that a *fi. fa.* may be added for realizing the amount of the damages for detention, interest and costs.

(*k*) Appendix, *infra*, pp. 418, 419, Forms Nos. 53—55.

CHAPTER VII.

EXECUTION AGAINST CLERGYMEN.

When it is sought to enforce execution against a clergyman, or person in holy orders, the private property belonging to him can be seized and dealt with to answer the execution just as is the case with the property of any other person. But property which he has in his character of clerk, can be taken only subject to provisions for certain paramount rights, and to certain special methods of procedure, which we proceed in this chapter to discuss. Position of clergyman as to execution.

To put the matter in another way, although a clergyman has many personal privileges (*a*), they do not extend to the exemption of his own property from execution; and even the property devoted to ecclesiastical purposes is liable to be taken, subject to restrictions, in satisfaction of a judgment or order for payment of money.

Glebe lands and the churchyard, being consecrated to God, are not subject to an *elegit* (*b*), nor can ecclesiastical goods, which phrase appears to mean rents and profits of glebe lands, be touched by lay hands (*c*). All execution against these two species of property must be effectuated through the bishop of the diocese in which they are situated (*d*). Glebe lands, and *bona ecclesiastica*.

(*a*) See Cripps' Church and Clergy, Ch. VI. As we have excluded from discussion in this work the subject of arrest for non-payment of debt, we have no need to deal with that privilege which the parson enjoys when attending public worship. Ch. Arch. 14th ed.

(*b*) Gilb. Ex. p. 40.

(*c*) *Arbuckle* v. *Cowtan*, 3 B. & P. 322. It is said that the policy of the law with respect to this is analogous to that of the doctrine which prevents the assignment of a salary for performance of a public duty.

(*d*) Sequestrators appointed by the Court of Chancery have no power to touch ecclesiastical goods, for instance, tithes. *Ward* v. *Hayes*, 1 Hog. 107.

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O. XLIII. r. 3. Writs against beneficed clerks.

By O. XLIII. r. 3,—"Where it appears upon the return of any writ of *fieri facias* or any writ of *elegit* (*e*), that the person against whom such writ was so issued is a beneficed clerk, and has no goods or chattels, nor any lay fee, in the bailiwick of the sheriff to whom such writ was directed, the person to whom the sum of money or costs mentioned in such writ is or are payable shall, immediately after such writ with such return shall have been filed as of record, be at liberty to sue out one or more writs of *fieri facias de bonis ecclesiasticis*, or one or more writs of *sequestration*."

The return on which writs directed to bishop founded.

The form of the return mentioned in this rule will be found in the Appendix (*f*). It is essential that it should be made before the writ against ecclesiastical goods can issue (*g*), but when made, no leave for issue of the writ is necessary (*h*). It must be observed, that the return should state whether the beneficed clerk is a rector or vicar, and the name of his benefice, for the reason that only property of which he is possessed as a *corporation sole* is liable to execution at all (*i*).

O. XLIII. r. 4. Execution of writs against beneficed clerks.

By O. XLIII. r. 4,—"Such writs as in the last preceding rule mentioned, when sealed, shall be delivered to the bishop to be executed by him, and such writs when returned by the bishop shall be delivered to the parties or solicitors by whom respectively they were sued out, and shall thereupon be filed as of record in the Central

(*e*) It is submitted that since, now, an *elegit* does not relate to goods, a return to that writ is insufficient to found the writs against ecclesiastical goods mentioned in this rule.

(*f*) Appendix, p. 419, *infra*, Form, No. 56.

(*g*) *Bromage* v. *Vaughan*, 7 Ex. 223. This implies that a creditor must exhaust the temporal goods before having recourse to spiritual. Of course no such recourse can be had after *elegit* executed; *Vide supra*, Chapter on *Elegit*. But a writ of *fi. fa.* or *seq. fa. de bonis eccles.* has been ordered to issue on the return of an ordinary sequestration issued out of Chancery. *Allen* v. *Williams*, 2 Sm. & Giff. 455. See, however, *Rabbitts* v. *Woodward*, 20 L. T. 693, 778.

(*h*) This has been the practice for a considerable period. *Caudwell* v. *Colton*, 10 C. B. 575.

(*i*) *Moseley* v. *Warburton*, 1 Ld. Raym. 265; *S. C.*, 1 Salk. 320.

Office; and for the execution of such writs, the bishop or his officers shall not take, or be allowed, any fees other than such as are, or shall be, from time to time allowed by lawful authority."

The position of the bishop.

The two writs issuable under rules 3 and 4 above quoted are directed to the bishop, who, in such case becomes for the purpose a temporal officer, a kind of ecclesiastical sheriff (*k*), and by virtue of the writ may seize ecclesiastical goods and sell them (*l*). He is, therefore, with respect to the Court and the execution, in a similar position to the sheriff, the method of proceeding against him, if he neglect his duty, being the same. He must return the writ if called upon to do so, and in default a rule or order may be made against him (*m*). For the reason, however, which will more fully appear when we come to discuss the mode of execution of the writ, the return should be asked for not of the writ but of the amount levied under it (*n*). If a false return be made an action can be brought against the bishop therefor (*o*). Where the bishop to whom the writ was directed dies, or is translated to another diocese, the execution continues and the return must be made by his successor (*p*).

Creditor may issue either *fi. fa. de bonis*

The execution creditor may at his option issue either a *fi. fa. de bonis ecclesiasticis* or a *sequestrari facias de bonis*

(*k*) But the execution of the writ is, in some sense, a judicial act. See *Powell* v. *Hibberd*, 19 L. J. Q. B. 347. *Vide infra*, p. 202, n. (*t*).

(*l*) *Walwyn* v. *Awberry*, 2 Mod. 257. During the vacancy of the See, the writ is directed to the Archbishop. See Appendix, *infra*, Form, No. 59.

(*m*) *Marsh* v. *Fawcett*, 2 H. Bl. 582; *Rex* v. *B. of London*, 1 D. & R. 486. But the debtor cannot compel a return (at least, so long as the debt is unsatisfied). *Hart* v. *Vollans*, 1 Dowl. 434. Whether the practice of *ruling* the bishop any longer exists, may be questioned. See terms of O. LII. r. 11.

(*n*) *Marsh* v. *Fawcett*, 2 H. Bl. 582; *Hart* v. *Vollans*, 1 Dowl. 434.

(*o*) *Pickard* v. *Paiton*, 1 Sid. 276; Gilb. Ex. 26.

(*p*) *Dawson* v. *Symmons*, 18 L. J. Q. B. 34; *Phelps* v. *St. John*, 24 L. J. Ex. 171. But he need not return what has been done by his predecessor. *Phillips* v. *Berkeley*, 5 Dowl. 279.

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eccles., or *seq. fa. de b. eccles.*

ecclesiasticis. The forms of these two writs are given in the Appendix (*q*). Both of them are executed in the same manner, by the bishop appointing sequestrators or a sequestrator under his warrant (*r*). It appears, therefore, to be a matter of small moment which of the two writs is chosen. They are stated to be in the nature of a *fi. fa.* and a *lev. fa.* respectively (*s*).

Practice on issue of writ.

The writ, on being issued, is taken to be executed to the registrar of the diocese, whose duty it is, without delay, to issue a sequestration in the nature of a warrant (*t*). This sequestration may be addressed to the churchwardens of the parish in which the living to be sequestered is situated, or to any other person in the discretion of the bishop (*u*). The sequestration is usually granted to the creditor himself or persons of his nomination (*x*). The sequestration varies in form according to whether a *fi. fa.* or a *sequestrari de bonis ecclesiasticis* has been issued, and according to the circumstances of the case. Forms of two sequestrations are given in the Appendix (*y*). In the same way that an ordinary writ of *fi. fa.* is, after it is delivered to the undersheriff, in the control of the person issuing, so, also, is a writ of ecclesiastical execution, after it has been delivered

(*q*) *Vide* Appendix, Forms, Nos. 58, 60.

(*r*) *Vide infra*, the Forms are given in the Appendix, p. 522, Forms, Nos. 61, 62.

(*s*) The *levari facias* would appear technically to be the more stringent proceeding, for example, it empowered the sheriff to cut down trees and crops, which he could not do under a *fi. fa.* See Ch. Arch. Pr. 13th ed. 602. The sequestrators, however, cannot cut down trees. Prid. Churchw. Guide, p. 521. *Vide infra.*

(*t*) The awarding of the sequestration upon the writ by the bishop is a judicial rather than a ministerial act. See *Powell* v. *Hibberd*, 19 L. J. Q. B. 347. Where several writs are delivered at once, apparently that creditor is entitled to the sequestration whose judgment is first in date. *Rex* v. *B. of London*, 1 D. & R. 486.

(*u*) *Hubbard* v. *Beckford*, 1 Hagg. Consist. Rep. 307; *S. C.*, note to *Whinfield* v. *Watkins*, 2 Ph. Eccl. Rep. p. 5.

(*x*) In such case, security for the due performance of the sequestration may be required by the bishop. See practice detailed, *Sturgis* v. *B. of London*, 7 El. & Bl. p. 550.

(*y*) *Vide infra*, Appendix, p. 421, Forms, Nos. 61, 62.

to the registrar, and it must be countermanded or enforced according to the directions of the creditor.

Publication of sequestration.

The first duty of the sequestrator is to publish the sequestration. The publication is made in the manner customarily in use in the parish, and where it was formerly the custom in the parish to make the publication in church during service, it must now be affixed, previously to the commencement of divine service (*z*), to the church doors (*a*). The rents and profits of the benefice are bound as against the incumbent and all other persons from the date of publication (*b*). It is from the date of publication that the priorities of competing sequestrations are ascertained, that publication which is first made entitling the creditor under it to be first satisfied; the mere issue of the sequestration has, in respect to the priority of various executions, no effect (*c*). The mere issue of a sequestration is, however, apparently of effect in the case of the incumbent debtor becoming bankrupt even before publication. By sect. 52 of the Bankruptcy Act, 1883 (*d*), where a bankrupt is a beneficed clergyman, the trustee may apply for a sequestration of the profits of the benefice, and the certificate of the appointment of the trustee shall be sufficient authority for the granting of sequestration without any writ or other proceeding, and the same shall accordingly be issued as on a writ of *levari facias* founded on a judgment against the bankrupt, and shall have priority over any other seques-

Effect of issue of sequestration prior to bankruptcy of incumbent.

46 & 47 Vict. c. 52, s. 52.

(*z*) Either morning or evening. *Burneley* v. *Overseers of Methley*, 28 L. J. M. C. 152.

(*a*) 7 Will. 4 & 1 Vict. c. 45, s. 2. Practically the case everywhere. See *Bennett* v. *Apperley*, 6 B. & C. 630.

(*b*) *Doe* d. *Morgan* v. *Bluck*, 3 Camp. 447; *Waite* v. *Bishop*, 1 C. M. & R. 507; notwithstanding the apparently contradictory *dictum* of Bayley, J., in *Bennett* v. *Apperley*, 6 B. & C. p. 634.

(*c*) *Legassicke* v. *B. of Exeter*, B. R. E. 22 Geo. iii.; 1 Cromp. Pr. 351. And, as to lands, *Wise* v. *Beresford*, 2 Con. & L. 282. The writ directed to the bishop does not, like a *fi. fa.* or *lev. fa.* at common law, bind the goods from the date of the teste; and the 16th section of the Statute of Frauds has no application to it. *Sturgis* v. *B. of London*, 7 E. & B. 542.

(*d*) 46 & 47 Vict. c. 52.

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tration issued after the commencement of the bankruptcy in respect of a debt provable in the bankruptcy, except a sequestration issued before the date of the receiving order, by or on behalf of a person who, at the time of the issue thereof, had not notice of an act of bankruptcy committed by the bankrupt, and available for grounding a receiving order against him (*d*).

Incumbent ousted by sequestration.

The effect of the sequestration is to take away from the incumbent the right to receive the rents and profits of the benefice; he is said, in fact, to be ousted from possession (*e*). The incumbent being, however, bound to reside in the parsonage house, the sequestration cannot oust him from that (*f*). The bishop is, on the sequestration being published, substituted for the incumbent, and regarded as being in possession, through or by means of the sequestrator, in the same way as the sheriff is regarded as being in possession by his bailiff (*g*).

Position and duties of the sequestrator.

Repairs.

The sequestrator is bound, out of the proceeds of the sequestration, to provide, just as the incumbent is bound to provide, for all necessary charges, specially for repairs and the performance of divine service (*h*). The sequestrator may be compelled by the bishop or churchwardens to repair the edifices belonging to the benefice, and nothing can exonerate him from this (*i*). There are statutory provisions regulating the duties of sequestrators as to repairs under which a surveyor of the diocese is elected, and his duty is to report upon the state of repair of dilapidated buildings in any benefices within it. The sequestrator is bound, subject to his substantiating before the bishop his objections thereto, to do the repairs specified

(*d*) The provisions of sects. 45 & 46 do not, it is submitted, apply at all to the case of a sequestration, whether by *fieri facias* or *sequestrari facias de bonis ecclesiasticis*.

(*e*) *Doe* d. *Morgan* v. *Bluck*, 3 Camp. 447; *Powell* v. *Hibberd*, 19 L. J. Q. B. 347.

(*f*) *Pack* v. *Tarpley*, 9 A. & E. 468.

(*g*) *Harding* v. *Hall*, 10 M. & W. 42.

(*h*) *Hubbard* v. *Beckford*, 1 Hagg. Cons. Rep. 307.

(*i*) *Whinfield* v. *Watkins*, 2 Ph. Eccl. Rep. 8.

in the surveyor's report, and the sum stated as their cost is made a charge on the monies received by the sequestrator in priority to all other charges, except the stipends of the curate or curates appointed to perform the duties attaching to the benefice (*j*).

Performance of service.

The proper service of the church is regulated by the bishop, who appoints the person who is to officiate, and fixes the amount of salary or stipend he is to receive. The bishop has not absolute discretion as to how much this stipend shall be, but it is regulated according to population, and must not, in any case, exceed two-thirds of the annual value of the benefice (*k*).

Sequestrator's power to sue, &c.

The sequestrator could not maintain an action at common law for tithes (*l*), but now he may, under the power conferred upon him by statute, bring and prosecute any action or levy any distress, or take any other proceeding in his own name, as the sequestrator of the particular benefice, without further description, for the recovery of rent, tithes, rent-charge, fees, or any other payments payable to the incumbent of the benefice, the power to bring the action being limited by the provision that it is sustainable only where, but for the sequestration, the incumbent might have brought and prosecuted it (*m*).

Payment to sequestrator, a discharge.

A payment made to the sequestrator is an effectual discharge to the party from liability to pay to the incumbent (*n*).

It would appear that interference with the sequestrator is a contempt (*o*).

Liability of sequestrators to account.

The sequestrator was always bound to account to the bishop under the sanction of being compelled thereto by

(*j*) Ecclesiastical Dilapidations Act, 1871, 34 & 35 Vict. c. 43. See Cripp's Church and Clergy, 6th ed., 531. *Kimber* v. *Paravicini*, 15 Q. B. D. 222.

(*k*) The Sequestration Act, 1871, 34 & 35 Vict. c. 45. See Cripp's Church and Clergy, 6th ed., 533.

(*l*) 3 Burn's Eccl. Law, 9th ed., 596. *Harding* v. *Hall*, 10 M. & W. 42.

(*m*) 12 & 13 Vict. c. 67, s. 1.

(*n*) Sect. 2. See *Powell* v. *Hibberd*, 19 L. J. Q. B. 347.

(*o*) Note to *White* v. *B. of Peterborough*, 3 Swans. p. 119.

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the Ecclesiastical Court (*p*). And there can hardly be a question that the Court had jurisdiction to make an order directly against him for the ease of the bishop (*q*).

Reference to master.

The accounts, when thus rendered to the bishop, are returned by him, and are then subject to disallowance by the Court, and may be referred to a master to report (*r*). The application for a reference should be made in the division from which the process issued, and should be, it seems, by motion (*s*).

Duration of sequestration.

The sequestration continues until its determination, which may happen by the levy of the sum indorsed upon it, by the death or suspension of the incumbent, or by his amotion (by which is meant his acceptance of another living), or by the return of the writ of *fi. fa.* or *sequest. fa. de bon. eccles.*, upon which it depends.

Suspension.

As to the grounds of suspension and the events upon which the bishop can exercise his power, reference must be made to works on ecclesiastical law. It is clear, however, that suspension does operate to determine the sequestration (*t*).

Inhibition of incumbent.

After a sequestration has been in force for more than six months, power is given by statute to inhibit the incumbent from performing any services of the church within the diocese (*u*). An inhibition has not, of course, the effect of determining the sequestration.

Amotion.

There is express statutable provision that, during the continuance of a sequestration, the incumbent of the bene-

(*p*) If, notwithstanding the decree of the ecclesiastical Court, the account was refused, a power of attorney might be given by the bishop to the creditor to sue at law upon the bond given by the sequestrator. Wats. Cler. Law. Ch. 30.

(*q*) *Garston* v. *Williams*, Longf. & Towns. 168.

(*r*) *Dawson* v. *Symmons*, 18 L. J. Q. B. 34. It would appear that the order will be made, notwithstanding that the accounts have been settled in the consistory Court. *Morris* v. *Phelps*, 19 L. J. Ex. 165.

(*s*) See *Williams* v. *Ivimey*, 23 L. T. 100; *Kimber* v. *Paravicini*, 15 Q. B. D. 222.

(*t*) *Bunter* v. *Cresswell*, 19 L. J. Q. B. 357; see *Morris* v. *Ogden*, L. R. 4 C. P. 687.

(*u*) 34 & 35 Vict. c. 45, s. 5.

fice, under sequestration, shall not accept or be instituted or licensed to any other benefice where thereby the sequestration would be vacated or avoided, unless with the consent in writing of the bishop of the diocese and the sequestrator (*x*).

Return.

The sequestration is a continuing execution unless the plaintiff takes away the authority under which the sequestration issues by calling generally for a return of the writ (*y*). The proper course is to rule (*z*) the bishop from time to time to know what he has levied (*y*). If the bishop returns the writ at his own instance before the debt has been levied, it will be taken off the file and sent back to him (*a*). Both plaintiff and defendant are, it seems, entitled to a return of what has been done, but the defendant cannot ask for a return of the writ itself (*b*).

Remuneration of sequestrator.

A reasonable allowance is usually made to a sequestrator according to the trouble he may have been put to in the collection of the rents and profits of the benefice.

Execution creditor takes subject to prior charge.

The same rule prevails in respect to this as to other methods of execution, that the creditor enforcing his debt by means of a sequestration against a clergyman, takes subject to every prior valid charge upon the benefice (*c*). And for determining the priority of valid charges and sequestrations, the Court will, no doubt, entertain an action (*d*). Although there can be no valid charge created by a beneficed clerk over his benefice (*e*), competing seques-

(*x*) 34 & 35 Vict. c. 45, s. 7.

(*y*) *Marsh* v. *Fawcett*, 2 H. Bl. 582.

(*z*) *Vide supra*, p. 201, n. (*m*).

(*a*) *Alderton* v. *St. Aubyn*, 6 M. & W. 150.

(*b*) *Hart* v. *Vollans*, 1 Dowl. 434. It is submitted that by analogy to the proceedings, under an ordinary writ of *fi. fa.*, he can do so after the debt has been satisfied.

(*c*) *White* v. *B. of Peterborough*, 3 Swans. 109.

(*d*) *Ib.*; *Errington* v. *Howard*, 1 Amb. 485.

(*e*) Nor does a judgment create a charge under sect. 13 of 1 & 2 Vict. c. 110, notwithstanding the words "rectories, tithes, &c." *Hawkins* v. *Gathercole*, 6 De G. M. & G. 1; *Bates* v. *Brothers*, 23 L. J. Ch. 782.

trations will be regarded as incumbrances in equity to the extent that an account be ordered by a prior to a subsequent sequestrator appointed by the bishop (*f*); but, of course, no authority competing with the sequestrator, such as a receiver, will be made (*g*).

(*f*) *Cuddington* v. *Withy*, 2 Swans. 174.

(*g*) See *Hawkins* v. *Gathercole*, 6 De G. M. & G. p. 18.

BOOK II.

CONCERNING METHODS OF EXECUTION WHERE DISOBEDIENCE IS A CONTEMPT OF COURT.

Subject of Book II.

We have in Book I. discussed judgments and orders, and their enforcement, so far as it relates to the right to legal, as distinguished from equitable, property. There are other methods of execution, where on a judgment or order for non-payment of money it is desired to have recourse to property of the execution debtor, which cannot be reached by the writs of *fieri facias* and *elegit*. The discussion of these methods forms that part of our subject which is treated of in Book III.

Book II., which we now introduce, we propose to divide into four Chapters:—

Chap. I.—Of the Nature of a Contempt of Court.
II.—Of the Writ of Attachment.
III.—Of Committal.
IV.—Of the Writ of Sequestration.

The writ which is the subject of this last-mentioned Chapter is a stringent process dealing in fact with property, but is, nevertheless, applicable only where a contempt of court has been committed. It is, therefore, appropriate that it should be treated of in this Book.

CHAPTER I.

OF THE NATURE OF A CONTEMPT OF COURT.

SECT. 1.—OF THE HIGH COURT.

WE have seen that the difference between a personal judgment or order, and one relating to or declaring title to property, is not a difference of form only, but in reality depends upon the particular jurisdiction, legal or equitable, which has been resorted to in pronouncing it.

Judgments and orders to do or abstain from doing.

Judgments and orders of the High Court directing persons to do, or abstain from doing, anything, are, for the most part, lineal descendants of decrees and orders in equity. The principles on which they are enforced are those which prevailed in the Court of Chancery, and have already formed the subject of discussion in our introductory Chapter. Wherever the jurisdiction there referred to is rightly exercised, the person disobeying the judgment or order is in contempt. The procedure to compel obedience took, at one time, the form of a "writ of execution" embodying the order which had been previously drawn up and entered. This writ of execution, having first appended to it the Great Seal (*a*), was served upon the party commanded to do or not to do the particular thing which was the subject of the decree or order. If the writ was disobeyed, the contempt was thereupon committed, technically, by the offence of not paying obedience to the Great Seal. The necessity for this writ and its service has been done away with. It is now sufficient to serve the judgment or

The "writ of execution."

(*a*) Gilb. For. Rom. 166; Dan. Ch. Pr. 5th ed. 903.

order; but, up to a comparatively recent date, it was still a fatal objection to an order for issue of process for contempt, that the "writ of execution," duly sealed, had not been served (*b*).

Undertaking in Court.

It is not only to a judgment or order properly made and served that the consequences of contempt are attached. The breach of an undertaking entered into in Court is, for our purposes, equally a contempt, and the usual process for enforcing compliance can be resorted to (*c*).

Ordinary contempt.

Breaches of judgments or orders to do, or abstain from doing, anything, and of undertakings entered into in Court, are known in the Chancery Division, following the language of the Court of Chancery, as "ordinary contempts."

The jurisdiction and execution at law different.

No such judgment as those above mentioned, nor any judgment having, with respect to execution, an equivalent effect, could be made at common law. It was, there, only where a contempt was committed in the face of the Court itself, or where a person had disobeyed a *rule of court* made against him, that process in the nature of execution could be taken against his person and enforced by writ of attachment.

The procedure by rule of court *nisi* and absolute.

The procedure in such cases was by an order or rule of court *nisi*, which called upon the person against whom it was directed to show cause why it should not be made absolute, and which thus gave him an opportunity of justifying whatever act of his might be complained of. This rule of court *nisi* and absolute was, in truth, ancillary to the right claimed in any particular action, where it might happen to be a part of the procedure. It did not form part of what the one litigant party claimed from the other, and, to entail the consequences of contempt for disobedience, could only be made in certain well-defined cases (*d*). The

(*b*) *Green* v. *Green*, 2 Sim. 394, A.D. 1828.

(*c*) It is said that in such cases committal, and not attachment, is the proper remedy. *Vide infra*, p. 257.

(*d*) An enumeration of these cases is to be found in 4 Bl. Com. 295, and more completely in Tidd's Pr. 478. It will be seen, on a refer-

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fact that the jurisdiction exercised was entirely different from that of the equity Courts, can hardly be better shown than by the fact that disobedience to a judge's order at law was no contempt until that order had been made a rule of court (*e*) And, in certain cases, the mere disobedience of a rule of court was not sufficient to bring a person into contempt. He must have had a demand made of him to perform it (*f*).

Where at the present time an order is made by one of the judges of the High Court, *in pari materia* with those formerly made by the judges of the common law Courts, disobedience is not contempt, unless such order is equivalent to a rule absolute.

Contempt of the Court itself.

Besides its jurisdiction to make the judgments and orders above referred to, every Court has, as incident to it, and resulting from the first principles of judicial establishments (*g*), the power of punishing for contempt of its jurisdiction and authority. The effect of the order made by the Court on such an occasion is distinct from that of the judgment or order which is given as relief to a person for any particular wrong done him. The essence of a contempt of the authority of a Court is the disrespect shown to it, and the insult passed upon its dignity. This kind of contempt is frequently a source of injury to persons who have no connection or relation with the Court, and they can frequently in such case invoke its jurisdiction for their redress. For example, the wrong-doer may be a solicitor, and, as such, may have committed an act which amounts to contempt of the Court of which he is an officer. There is no doubt he is liable to its summary

ence to these passages, that, except in the case of disrespect of the Court's authority, and a breach of an agreement which had been made a rule of court, the person against whom process for contempt could issue always occupied a defined relation to the Court.

(*e*) *Baker* v. *Rye*, 1 Dowl. 689; *Chilton* v. *Ellis*, 2 Cr. & M. 459; *Ex parte Laurence*, 2 Dowl. 230.

(*f*) See *Evans* v. *Millard*, 3 Dowl. 661; *Swinfen* v. *Swinfen*, 18 C. B. 485.

(*g*) 4 Bl. Comm. ed. 1876, 297.

jurisdiction, and it will compel him, as its officer, to do justice. Another example occurs where undue means have been employed for executing process (*h*). With this kind of contempt, although the parties to litigation may have an interest in bringing the matter before the Court, we have but little to do. It can hardly be said to be more than collateral to the subject of execution. Where an officer of the Court, engaged in the process of execution, has neglected or broken his duty, the most convenient way of obtaining redress against him may be by a summary application to the tribunal entertaining the matter. To this extent we are concerned in the inquiry of how he should be dealt with, and shall endeavour to answer it, as we have already done in the case of sheriffs and other officers engaged in the execution of writs.

"Special contempt."

It should be mentioned that the kind of contempt committed by disrespect shown to the authority of the Court is known to the Chancery Division, again following the language of the Court of Chancery, as "special contempt."

Sect. 2.—The Right to Process for Contempt.

True nature of contempt in disobedience to a judgment or order.

From what we have stated in sect. 1 of this Chapter, the extent of our inquiry can be easily gathered. We have broadly to consider only those cases of contempt where one party has the right to enforce against the other the judgment or order of the Court. The view from which we desire the subject to be regarded is set forth with some force in the *dictum* of Sir John Nichol, when sitting in the Arches Court of Canterbury. He says: "A notion prevails that a contempt must be some disrespect shown to the Court, and that the imprisonment is in the discretion, and terminable at the pleasure, of the judge. This is

(*h*) See *Anon.*, 2 Ken. 372.

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erroneous. Contempts are usually incurred by a party's neglect or refusal to do some act which is in justice due to the other party to the cause, such as the giving of answers, the payment of costs, or the like, and the imprisonment which follows is at the prayer of the other party—a prayer to which the Court cannot refuse to accede without a breach of its duty and a denial of justice" (*i*).

Main principle that one party has the right to enforce process against the contemnor.

The principle is implied in this *dictum*—that where a judgment or order has been obtained against a litigant party, and process for contempt against his person is the appropriate remedy, the party in whose favour the judgment is made has a right to issue such process (*k*). He therefore can waive his right, and thereby release the contemnor from liability for his contempt (*l*), which, were the dignity of the Court in question, could not be done without its sanction. The principle has always been recognized, and has been recently re-stated in the form that, where the appropriate remedy is by process for contempt, the Court has no discretion, no matter how oppressive the jurisdiction may be (*m*). An illustration of the principle may be found in the law, when the right to appeal is in question, which, though somewhat wide of our subject, may well be mentioned. Where the process for contempt is a matter of right, an appeal lies to the Court of Appeal from the order authorising it, but where the issue of such process is a matter of discretion, an appeal will not be entertained, except in cases of gross miscarriage (*n*).

Illustration: right of appeal.

The limitations to this important rule, which we have expressed in the language of Sir John Nichol, should be

(*i*) *Barlee* v. *Barlee*, 1 Add. 301.

(*k*) See the instructive judgment of Brett, L. J., *In re Freston*, 11 Q. B. D. 545, for comparison of ordinary process for contempt for non-payment of money in equity, and *ca. sa.* at law.

(*l*) *Anon.*, 15 Ves. 174; *Woodward* v. *Twinaine*, 9 Sim. 301; *Roberts* v. *Albert Bridge Co.*, L. R. 8 Ch. 753.

(*m*) *Evans* v. *Bear*, L. R. 10 Ch. 76.

(*n*) It is submitted that this proposition is supported by *Ashworth* v. *Outram*, 5 Ch. D. 943; *Jarmain* v. *Chatterton*, 20 Ch. D. 493.

clearly ascertained. The rule itself does not stand entirely free from contradiction in the language adopted by the judges in certain recent cases (*o*), and the *ratio decidendi* in one of them appears to be absolutely inconsistent with the principle (*p*); but notwithstanding these apparently inconsistent decisions, it is submitted that the rule still stands, subject to the limitations which we now proceed to discuss (*q*).

Contradictory dicta.

The reason for the rule does not exist where the jurisdiction of the Court is sought to be exercised punitively, as, for example, where the contempt charged is a "special contempt." For when the contempt alleged is mere disrespect to the Court, there is no judgment which the parties can, of right, seek to enforce one against the other.

Limitations of the rule.

Special contempt.

Again, the rule cannot apply where the process of the Court is attempted to be set in motion *ex post facto*, and no prospective purpose could be served by its being effectuated (*r*); or, to take another expression of the same circumstances, where all the evils of non-compliance have already happened (*s*).

No prospective purpose to be gained.

Where other methods of execution, besides personal process, are available, and have not been exhausted, the Court will, it is submitted, exercise its discretion in ordering or allowing process for contempt to issue (*t*). This is, of course, inconsistent with the issue of process as of right. The cases where such other methods of execution are available have, for the most part, been provided for by statute,

No application where other pertinent remedy.

(*o*) See *Ashworth* v. *Outram*, 5 Ch. D. 943.

(*p*) *Ferguson* v. *Ferguson*, L. R. 10 Ch. 661.

(*q*) *Jarmain* v. *Chatterton*, 20 Ch. D. 493.

(*r*) *Ex parte Fletcher*, 2 M. D. & De G. 129, though the person in contempt was in that case ordered to pay costs.

(*s*) *Ex parte Fletcher*, 2 M. D. & De G. 129; *Ashworth* v. *Outram*, 5 Ch. D. 943, may perhaps be explained on this ground, though for another explanation, see *Jarmain* v. *Chatterton*, 20 Ch. D. 493.

(*t*) "If no other pertinent remedy can be found." Jessel, M. R., *Re Clements, Republic of Costa Rica* v. *Erlanger*, 46 L. J. Ch. 375. See also *Grace* v. *Baynton*, 25 W. R. 506.

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and execution against property substituted for imprisonment of the person. We proceed to discuss the statutable enactments on this branch of our subject.

Judgments or orders for payment of money.

The first subjects of statutable interference we shall refer to are those judgments or orders made for payment of money, and of which disobedience is a contempt. Under such judgments or orders are included as well those for payment from one person to another, as those for payment into Court (*u*).

Position of bankrupt in contempt for non-payment.

To some extent the enforcement of the order of the Court that money shall be paid, was always regarded as in the nature strictly of an execution directed to obtain the money itself. To illustrate, a person who had become bankrupt and could not pay was entitled to be released from custody (*x*). And at the present date, as well as in times gone by, the bankruptcy of a contemnor in contempt for non-payment of money still materially affects his position with respect thereto. If the debt is one for which the bankrupt would, by his discharge, obtain a release, the Court will doubtless order his discharge. But where the debtor has procured his own bankruptcy, the Court will not order his discharge (*y*). In a case where the debt was one from which bankruptcy did not release the debtor he was discharged pending the bankruptcy (*z*). The discharge from custody was refused where the defaulter bankrupt was a solicitor, and the order for committal was made against him punitively (*a*). From this illustration it is clear that, although process for contempt may be considered as in some sort a method of execution for recovering the amount due, it is, in reality, more than that, for the Court

(*u*) At one time the only order made in Chancery, with reference to payment of money, was for payment into Court.

(*x*) *Ex parte Parker*, 3 Ves. 554; *Re McWilliams*, 1 Sch. & Lef. 169, p. 174; see *Harvey* v. *Harvey*, 26 Ch. D. 644.

(*y*) *Earl of Lewes* v. *Barnett*, 6 Ch. D. 252.

(*z*) *Cobham* v. *Dalton*, L. R. 10 Ch. 655; *Pashler* v. *Vincent*, 8 Ch. D. 825.

(*a*) *In re Deere*, L. R. 10 Ch. 658.

does not discharge an arrested debtor as of right, nor necessarily refuse to arrest him on the ground of his bankruptcy. Where there is no such circumstance as bankruptcy, and no statutable enactment to protect the defaulter, the other party is entitled, as of right, to his execution against the person of the contemnor, and the Court has no jurisdiction to refuse an application for that purpose (*b*).

Act for abolition of mesne process. 1 & 2 Vict. c. 110. Sect. 18.

A considerable alteration in the law, and consequently in the practice of the Courts, was made by the statute for the abolition of arrest on mesne process (*c*). By sect. 18 of that statute it is enacted "that all decrees and orders of Courts of equity, and all rules of Courts of common law, and all orders of the Lord Chancellor, or of the Court of review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges or expenses, shall be payable to any person, shall have the effect of judgments in the superior Courts of common law."

1 & 2 Vict. c. 110, s. 20.

By sect. 20 of the same Act, the Courts were empowered to issue such new writs as might be necessary or expedient for giving effect to the provisions of the Act. In pursuance of this section, orders in Chancery were made, and forms of writs of *fi. fa.*, *elegit* and *vend. exp.* authorized, corresponding, except with respect to the recitals, with the forms in ordinary use at common law (*d*).

Effect of the statute on personal process.

It is to be observed, that the statute extends only to decrees and orders made for payment by one person to another of a definite sum (*e*), and not to decrees or orders for payment of money into Court (*f*). There is, in this enactment, no limitation of the powers of the Court of Chancery to commit for contempt; but it could, after the

(*b*) *Evans* v. *Bear*, L. R. 10 Ch. 76. In complete accord with the language of Sir John Nichol in *Barlee* v. *Barlee*, 1 Add. 301, above referred to.

(*c*) 1 & 2 Vict. c. 110.

(*d*) 1 Beav. App. XII.; 3 Y. & Col. Ex. App. IV.

(*e*) See *Duke of Beaufort* v. *Phillips*, 1 De G. & S. 321.

(*f*) *Gibbs* v. *Pike*, 8 M. & W. 223.

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passing of the Act, still proceed to enforce the payment of money in that manner, notwithstanding that the creditor might issue an ordinary writ of execution for recovery of it. Instead, however, of the process being obtainable by the party entitled to it as a matter of right, wherever the statute provided another pertinent remedy by which satisfaction could be obtained, the Court would doubtless, if the question had arisen, have considered process for contempt as a matter of discretion (*g*).

The Debtors Act, 1869.

This state of the law continued down to 1869, when the Debtors Act (*h*) was passed. The operation of this statute was in some cases to entirely prohibit the exercise of the right to personal process against the contemnor which formerly existed; and, in other cases, to very considerably modify or limit the power of every Court to imprison a person in contempt for non-payment of money.

32 & 33 Vict. c. 62, s. 4.

Sect. 4 of the Act is as follows:—"With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money.

"There shall be excepted from the operation of the above enactment—

(1.) Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract.

(2.) Default in payment of any sum recoverable summarily before a justice or justices of the peace.

(3.) Default by a trustee or person acting in a fiduciary capacity, and ordered to pay by a Court of equity any sum in his possession or under his control.

(4.) Default by an attorney or solicitor in payment of costs, when ordered to pay costs for misconduct as such, or in payment of a sum of money, when ordered to pay the same in his character of an officer of the Court making the order.

(5.) Default in payment, for the benefit of creditors, of

(*g*) *Vide supra*, p. 215. (*h*) 32 & 33 Vict. c. 62.

any portion of a salary or other income, in respect of the payment of which any Court having jurisdiction in bankruptcy is authorized to make an order.

(6.) Default in payment of sums in respect of the payment of which orders are in this Act authorized to be made.

Provided, first, that no person shall be imprisoned, in any case excepted from the operation of this section, for a longer period than one year: and, secondly, that nothing in this section shall alter the effect of any judgment or order of any Court for payment of money, except as regards the arrest and imprisonment of the person making default in paying such money."

A year's imprisonment the limit for all contempt for non-payment.

Since this Act, no imprisonment whatever for contempt of Court for non-payment of money is lawful for a longer period than a year. This is true even in those cases which are excepted from the Act (*i*).

The Debtors Act, 1878.

The exceptions in the Act, with the limitations placed upon them by the proviso at the end, left untouched the former law, and the right of the injured person to issue process for contempt in the cases we have mentioned remained, notwithstanding the statute. This was found to be still in many cases unduly harsh, and a new discretion entirely was given to the judges by the Debtors Act, 1878 (*k*). Under that enactment, in any case coming within the exceptions numbered (3) and (4) in the 4th section of the Debtors Act, 1869, any Court or judge making the order for payment, or having jurisdiction in the action or proceeding in which the order for payment is made, may inquire into the case, and (subject to the proviso in the section) may grant or refuse, either absolutely or upon terms, any application for a writ of attachment, or other process or order of arrest or imprisonment, and any application to stay the operation of any such writ, process, or

(*i*) *Vide Middleton* v. *Chichester*, L. R. 6 Ch. p. 156, *passim*; and is the reason for the note to that effect on all writs of attachment. *Vide infra*.

(*k*) 41 & 42 Vict. c. 54.

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order, or for discharge from arrest or imprisonment thereunder.

Payment to a person and into Court.

The distinction between a judgment for payment of money to a person, and payment into Court, has already been mentioned. Its practical importance will be seen more clearly when the writ of sequestration comes to be discussed. The Debtors Act covers judgments of both kinds, for the reason that the words are general—"for making default in payment" (*l*).

These statutes have no effect as to contempt itself.

In order to understand the operation, so far as it concerns us, of these two statutes, it should be mentioned that they do not affect in any way the mere question whether or not a contempt of Court has been committed. The Act of 1869 does no more than to abolish, in certain cases of non-payment of money, imprisonment for that contempt. In like manner, the Act of 1878 gives the Court a discretionary power only in the cases therein named, and leaves untouched the principle of *Barlee* v. *Barlee* (*m*).

Judgments and orders with respect to land.

We have thus far considered the effect of judgments or orders for payment of money; but where they are for delivery of land, they form the subject of enactments and rules which are perfectly distinct. The basis of the jurisdiction is, of course, in both cases the same—disobedience of the order of the Court is a contempt. But in the case of land there is no enactment similar to sect. 18 of 1 & 2 Vict. c. 110, above referred to; nor is there any statute like the Debtors Act, 1869, limiting the powers of the Court with respect to imprisonment.

Old practice as to land.

The old practice, when a decree was made directing one person to give possession of land to another, was to proceed, in the first place, for contempt. If this process was stood out, a "writ of assistance," directed to the sheriff, was awarded on motion (*n*).

(*l*) See *In re Byrne*, 6 L. R. Ir. 455; *Hutchinson* v. *Hartmont*, W. N. 1877, 29.

(*m*) *Vide supra*, p. 213.

(*n*) The whole procedure was strictly *in personam*, the process subsequent to attachment being considered as essentially in assist-

The writ of possession.

Now, every judgment and order for the recovery or for the delivery of land is enforceable by writ of possession, and although there is no enactment derogating from the jurisdiction of the Court to commit, it is manifest that, since the pertinent remedy of this writ exists, that jurisdiction would hardly be exercised. We have already discussed the writ of possession at some length.

Judgments or orders as to specific things.

The Court of Chancery was not infrequently called upon to exercise its jurisdiction to enforce the delivery of specific things. The cases where this jurisdiction was resorted to arose when the thing or article detained was *sui generis*, so that the damages which a Court of law could award could not be an adequate measure of the injury inflicted upon the owner of the thing (*o*). The Court of Chancery proceeded to compel obedience to its decrees and orders in such cases by the usual process of contempt, and the same jurisdiction is, at the present time, exercised in the Chancery Division. It has been decided that the writ of delivery, which would otherwise perhaps have formed an appropriate remedy in such cases, applies only to a judgment where the value of the specific thing sought to be recovered has been assessed, when in fact a judgment of the same effect as a judgment in detinue has been delivered (*p*).

Modification of the rule that party has a right to process for contempt.

The proposition, therefore, that in cases where a contempt has been committed in non-performance of a duty enjoined by a judgment or order, the person towards whom that duty should have been performed has a right

ance merely of the ordinary process for contempt. See the cumbrous machinery set forth, Beames' Ch. Ord. See judgment of Lord Redesdale in *East India Co.* v. *Kynaston*, 3 Bli. 153, p. 166. For form of writ of assistance, Braithwaite's Record and Writ Practice; Dan. Ch. Pr. 4th ed. 957. The writ of assistance is no longer issued. *Hall* v. *Hall*, 47 L. J. Ch. 680.

(*o*) *Pusey* v. *Pusey*, and *Duke of Somerset* v. *Cookson*, 1 W. & T. L. C. 961 (6th ed.).

(*p*) *Corbett* v. *Lewin*, W. N. 1884, 62, following *Chilton* v. *Carrington*, 15 C. B. 730; *vide supra*, p. 197.

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to the issue of process for contempt, requires considerable modification. The power to imprison for non-payment of money is modified, as we have seen, by the Debtors Act. Obedience to judgments or orders enjoining the delivery of land is enforceable, in the first place, by appropriate writs, and only by personal process when those writs have been exhausted.

Sect. 3.—Execution by Substitutionary Process.

Substitutionary methods of execution.

The necessity for proceeding personally against a contemnor for disobedience to the order of the Court, has been in many cases further modified by statutory enactment. Provision has been made that, where an order has been pronounced for the performance of some duty, the order may be sufficiently complied with by persons other than those commanded to perform it. This is merely a method of substitutionary execution.

Where a person had been ordered to execute a deed, he could, by persistent refusal to comply with the order, defy any method of execution which might be devised to compel his compliance. This case was, where a deed was ordered to be executed, attempted to be met by an enactment which provided that, after imprisonment for two months, if the contemnor still persisted in his refusal to execute, power should be given to the Court to order one of the Masters, or, if the act was to be done out of London, one of the Masters Extraordinary, to execute the deed in his name (*q*).

Power to vest lands under Trustee Acts.

This enactment still stands unrepealed, but is practically abrogated by others. The Trustee Acts, 1850 and 1852 (*r*), enabled the Court to vest lands and other property in the events mentioned therein, and thereby, for many

(*q*) 11 Geo. IV. & 1 Will. IV. c. 36, s. 15, r. 15. See also 15 & 16 Vict. c. 80, s. 36, repealed 46 & 47 Vict. c. 49.

(*r*) 13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55.

purposes, superseded the above-mentioned enactment (*s*). A still wider power is now vested in the Court; for by sect. 14 of the Judicature Act, 1884 (*t*),—"Where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract, or other document, or to indorse any negotiable instrument, the Court may, on such terms and conditions (if any) as may be just, order that such conveyance, contract, or other document shall be executed, or that such negotiable instrument shall be indorsed, by such person as the Court may nominate for that purpose, and in such case the conveyance, contract, document or instrument so executed or indorsed shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it."

Sect. 14, Judicature Act, 1884.

Under this section the late Mr. Justice Pearson, on the refusal of a defendant to comply with an order to execute a mortgage over certain real estate the subject of the action, nominated his chief clerk as the person to execute the mortgage (*u*).

Still wider powers for these methods, which we have termed substitutionary execution, were given by O. XLII. r. 30, whereby,—"If a mandamus, granted in an action or otherwise, or a mandatory order, injunction, or judgment for the specific performance of any contract be not complied with, the Court or a Judge, besides or instead of proceedings against the disobedient party for contempt, may direct that the act required to be done may be done so far as practicable by the party by whom the judgment or order has been obtained, or some other person appointed by the Court or Judge, at the cost of the disobedient party, and, upon the act being done, the expenses incurred may be ascertained in such manner as the Court or a Judge may direct, and execution may issue for the amount so ascertained, and costs."

O. XLII. r. 30. Effectuation of mandamus, &c., by means of plaintiff himself.

(*s*) See, in a case of specific performance, *Hall* v. *Hale*, 51 L. T. 226.

(*t*) 47 & 48 Vict. c. 61.

(*u*) *Re Edwards*, 33 W. R. 578.

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This rule is specially important in connection with sect. 14 of the Judicature Act, 1884, above referred to. It does not apply to a mere undertaking (*x*).

Contempt for not delivering or depositing in Court.

There is, besides these general enactments, a special power given to sequestrators, after the committal of a person for contempt, to seize books, papers, or any other articles ordered to be deposited in Court, and which are in the custody of the person against whom the sequestration issues, just as if the sequestrators were seizing the contemnor's own property (*y*).

As was observed at the commencement of this section, these various methods of substitutionary execution considerably modify the extent of the right to the issue of personal process.

Sect. 4.—Consequences of Contempt.

Attachment and committal.

It will appear in the two next Chapters that there are two methods whereby the judgment or order of the Court is enforced against the person. The one is a writ of attachment, the other an order and consequent warrant of commitment. In whichever of these two ways a person is imprisoned for contempt, the imprisonment does not operate as a discharge of the debt due, or the obligation incurred under the judgment. At law, when by writ of *ca. sa.* a person who owed money was taken, his arrest and imprisonment were a discharge of the debt. No such result followed from imprisonment for contempt (*z*), and in equity the contemnor was arrested, as it has been put, on *mesne* process to answer for his contempt in disobeying (*a*). This is undoubtedly the case at the present time.

Contempo-

The imprisonment, being in punishment for contempt only,

(*x*) *Mortimer* v. *Wilson*, 33 W. R. 937.

(*y*) 11 Geo. IV. & 1 Will. IV. c. 36, s. 15, r. 16.

(*z*) *Reg.* v. *Hemsworth*, 3 C. B. 745; *Reg.* v. *Weston*, 8 Jur. 1122.

(*a*) *Roberts* v. *Ball*, 3 Sm. & G. 168.

is, therefore, no obstacle to issuing any other writ; for example, a writ of sequestration (*b*) to enforce, in another manner, the obligation imposed by the judgment or order (*c*).

Extraneous attachment and other process.

Imprisonment of the person and other methods of execution are not the only means adopted by the Court to enforce obedience to its direct judgments or orders. We refer to the rule that the parties to an action must clear their contempt before they can be heard (*d*). The rule appears to have its origin in an ordinance of Lord Bacon, where it is expressed in the very widest terms (*e*).

Position of persons in contempt with regard to their proceeding.

It is thus expressed by another old authority, "And upon this head it is to be observed, as a general rule, that the contemnor who is in contempt is never to be heard by motion or otherwise till he hath cleared his contempt, and paid the costs: as, for example, if he comes to move for anything, or desires any favour from the Court, if the other side says or insists that he is in contempt, tho' 'tis but an attachment for want of an answer, which, if not executed, is only ten shillings, and if executed, is twelve shillings and sixpence, yet even in this case he is not entitled to be heard until he hath paid these costs (however small they are), &c." (*f*).

The precise limits assigned to the rule (if rule it be), The rule in

(*b*) *Hide* v. *Pettit*, 1 Ch. Ca. 91; *Wells* v. *Gibbs*, 3 Beav. 399.

(*c*) Formerly, *i. e.* before the repeal of sect. 16 of 1 & 2 Vict. c. 110, by Stat. Law Rev. Act, 1874 (37 & 38 Vict. c. 96), if the debtor were taken into custody in satisfaction of the debt, the creditor ceased to be entitled to a charge or the benefit of any security whatsoever given over land by the Act 1 & 2 Vict. c. 110. This was held not to apply to imprisonment for contempt. *Roberts* v. *Ball*, 3 Sm. & G. 168; *Wells* v. *Gibbs*, 3 Beav. 399; and *Maguire* v. *O'Reilly*, 3 J. & L. 224, p. 241; *Gibbs* v. *Pike*, 8 M. & W. 223.

(*d*) *Vowles* v. *Young*, 9 Ves. 172; *Wenman* v. *Osbaldiston*, 3 Bro. P. C. 276; *Garstin* v. *De Garston*, 34 L. J. Mat. Ca. 45.

(*e*) Beames' Ch. Orders, 35.

(*f*) Gilb. For. Rom. 102. It is on this same principle that a person appealing against an order of committal or attachment for contempt will not be heard, unless he comes in in person and submits to the jurisdiction of the Court.

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modern practice.

by the more modern practice, are difficult to define (*g*), and, perhaps, it may be regarded merely as an expression of the principle upon which the Court acts in ordering a stay of proceedings at the instance of the defendant (*h*). There is no doubt, however, that if a plaintiff continues in contempt, his action may be dismissed (*i*).

Discharge, clearing contempt.

Where a person is imprisoned for contempt, he must, before he has a right to go free, submit to the Court and clear his contempt (*k*); though it is said that where no useful object can be gained, and the purposes of justice will not be answered, by detaining a party in custody for contempt, the Court is bound to discharge him (*l*).

But even if he does clear his contempt, he must come to the Court on motion (*m*) to pray for his discharge. Until an order for his discharge, he is still in contempt (*n*).

Imprisonment for one year only.

However, where a person is imprisoned in any case within the exceptions contained in sect. 4 of the Debtors Act, 1869, he is discharged as of course without motion or order at the end of one year, for the reason that the writ of attachment, by having thereon an indorsement to that effect, only authorizes his detention for that period (*o*).

(*g*) See *Wilson* v. *Bates*, 3 My. & Cr. 197, and authorities referred to in 1 Dan. Ch. Pr. p. 904; *Madden* v. *Woods*, 7 Ir. Eq. Rep. 637.

(*h*) *Ricketts* v. *Mornington*, 4 L. J. (N. S.) Ch. 21; *Re Neal*, *Weston* v. *Neal*, 31 Ch. D. 437.

(*i*) *Republic of Liberia* v. *Imperial Bank*, L. R. 9 Ch. 569; *S. C.*, *sub nom. Republic of Liberia* v. *Roye*, L. R. 1 Ap. Ca. 139. The mere non-payment of costs of an unsuccessful motion will not of itself be sufficient to found an application to dismiss: *Gould* v. *Twine*, 43 L. J. Ch. 381.

(*k*) See Dan. Ch. Pr. 901 *et seq.*, 6th ed.

(*l*) *Joyce* v. *Joyce*, Sau. & Sc. 703.

(*m*) Formerly by petition. Dan. Ch. Pr. 6th ed. 902.

(*n*) *Green* v. *Thompson*, 1 S. & S. 121. The notice of motion must be served upon the other parties to the proceedings; this is upon the principle that contempt is a method of execution laid down in *Barlee* v. *Barlee*, 1 Add. 301.

(*o*) *In re Edwards*, *Brooke* v. *Edwards*, 21 Ch. D. 230. But where there is no such indorsement an order for discharge is still perhaps necessary. *Nalty* v. *Aylett*, 43 L. J. Ch. 721.

Considerable statutory powers are given to the Court with respect to the discharge of prisoners.

General power to discharge from custody.

By rule 17, s. 15 of 11 Geo. IV. & 1 Will. IV. c. 36, in any other case of commitment for contempt (not specifically provided for in the Act), the Court may, upon any application made after seizure of papers by sequestrators under rule 16 of the same section, to which we have already referred, or upon any report of visitors provided for by the Act, make such order for the discharge of the prisoner upon any such terms, and making, if the Court shall see fit, any costs costs in the cause, as to the Court shall seem proper.

This rule would appear to give the widest discretion to the Court, and in such view affords a significant commentary upon the right of any party to process for contempt, which we have already dwelt upon.

Discharge after seizure by sequestrators.

Again, by rule 16, already referred to (*p*), after seizure by the sequestrators of articles not belonging to the contemnor, but in his possession, which can only take place, as we have seen, after his committal, power is given to discharge the prisoner on such terms as to the Court shall seem proper.

Process for contempt where insolvent contemnor has cleared contempt except for costs.

By sect. 17 of 11 Geo. IV. & 1 Will. IV. c. 36,—"Where the process of contempt is for the non-performance of an act, for example, the not answering the plaintiff's bill, and the bill in equity to which the insolvent is a party is taken *pro confesso*, and he has not paid the costs of the contempt, or the insolvent has fully answered the plaintiff's bill or interrogatories, or otherwise cleared his contempt, except as far as regards the payment of the costs, or it has become in event unnecessary for him to do the act for the non-performance of which he was committed or attached, the Court of equity in which the suit is depending shall, upon the application of the party in contempt, discharge him from the same, except (*q*) as to the costs thereof, for which he

(*p*) *Supra*, p. 224.

(*q*) The exception as to costs is repealed by 42 & 43 Vict. c. 59.

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shall remain in custody, and such costs shall be deemed within the provision lastly hereinbefore contained, and he shall be dischargeable therefrom, and from the process of contempt, in like manner as if the process of contempt were for non-payment of money or costs; provided that this order or regulation shall not weaken any of the other powers by this Act given, nor shall anything herein contained lessen the operation of the said Act for the relief of insolvent debtors."

Power of compulsory discharge.

And to close the statutory enactments relating to the discharge of the contemnor, by rule 18 of the same section power is given to the Court to discharge compulsorily a prisoner entitled to his discharge, although he omits to make any application therefor, or to discharge him from the contempt, and leave him in custody for the costs.

CHAPTER II.

THE WRIT OF ATTACHMENT.

Connection between this and last Chapter.

THE jurisdiction of the Court to enforce its judgments by personal process was discussed in the last Chapter, and the extent to which that jurisdiction has been interfered with, or modified by statute and by the rules of practice, considered. We now proceed to discuss the process itself, and the methods of enforcing judgments and orders, of which disobedience is a contempt of Court.

The process most in use is the writ of attachment (*a*). There is one other method of proceeding against a person in contempt, viz., by committal. This last-named process is carried out without recourse to any writ, the officer's authority being contained in a warrant merely, and is still resorted to in some cases. It will be discussed in the next Chapter.

Form of writ of attachment.

The form of the writ of attachment, as prescribed by the rules (*b*), is as follows:—

Victoria, by the grace of God, &c.

To the sheriff of , greeting:

We command you to attach C. D., so as to have him before us in the Division of our High Court of Justice, wheresoever the said Court shall then be, there to answer to us, as well touching a contempt, which it is alleged he hath committed against us, as also such other matters as shall be then and there laid to his charge, and

(*a*) As to antiquity of this writ, see note (*a*), 1 Sp. Eq. Jur. 391.

(*b*) O. XLII. r. 14, Appendix H. No. 12.

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further to perform and abide such order as our said Court shall make in this behalf, and hereof fail not, and bring this writ with you (*d*).

Witness, &c.

Sect. 1.—The Issue of the Writ.

Sub-sect. (i).—*The Jurisdiction and Rules of Court indicating when the Writ is issuable.*

Jurisdiction.

In all cases where a contempt of Court has been committed, there can be no question of the power and authority of the Court to issue a writ of attachment (*e*), except where that method of procedure is forbidden by the Debtors Act of 1869. It is impossible, therefore, to enumerate every case in which the writ will be granted, or to frame a general proposition which shall at once include and describe the events on which it will issue. It is sufficient, for the present, to state that the usual method of procedure to enforce execution for contempt is a writ of attachment, but that in certain well-recognized events the Court proceeds by order of committal and warrant to the proper officer for enforcement.

Leave to issue essential in all cases.

The writ of attachment does not issue as of course; by O. XLIV. r. 2,—"No writ of attachment shall be issued without the leave of the Court or a judge, to be applied for on notice to the party against whom the attachment is to be issued."

Issue of writ at law.

It was always, at common law, an acknowledged principle, that a writ of attachment could not be issued except on an order of the Court (*f*). Further, it was always

(*d*) This form is substantially that formerly in use in Chancery. See Braithwaite's Forms, 158. See Appendix, *infra*, Form No. 64, for writ and indorsements.

(*e*) See discussion of the jurisdiction to issue process for contempt, and comparison of English and Irish practice as to committal and attachment, *Re O'Reillys*, 2 Hog. 20.

(*f*) "Where judgment is given against one who is in view of the Court, or in Westminster Hall, it

recognized that the order *nisi* must have been served personally (*g*). In the two cases only of the attachment of a sheriff for disobedience to an order to return a writ, and of the non-payment of costs on a master's allocatur, the order for issue of attachment was absolute in the first instance; in all other cases the writ was only issued after an order had been made on a rule *nisi*, which had been served on the person sought to be attached (*h*). In Chancery, no order of the Court for the issue of the writ was necessary, for the ordinary method of execution being by means of the writ, it was issued at the applicant's wish, and if he in issuing it was wrong he took the consequences (*h*). This rule, therefore, has of itself entirely altered the practice in the Chancery Division (*i*), and in conjunction with the provisions of O. LII. rr. 1, 2, and O. LIV. r. 1, has changed the practice which would otherwise have prevailed in the Queen's Bench Division, by making the order for the writ obtainable on motion, and not by means of rule *nisi* and absolute.

Issue of writ in Chancery.

At law, the process against an officer of the Court who had disobeyed an order made against him in that capacity, was a writ of attachment. In equity, a writ of attachment could not issue against a disobedient officer, *e.g.*, a receiver, for he was not a party to the cause; the process against him was an order for his committal (*k*). This procedure was, perhaps, varied by the terms of Consolidated Order XXIX. r. 3, which authorized the issue of a writ of attachment to enforce obedience against any person. This rule of the Consolidated Orders was abrogated by rule 2 of

Process for contempt at law and in equity against officers of the Court.

may be executed immediately, and the party taken or sent for into Court and committed. But this can scarcely occur in civil actions where judgment must be signed." *Anon.*, 3 Salk. 160.

(*g*) *Rex* v. *Smithies*, 3 T. R. 351.

(*h*) *Abud* v. *Riches*, 2 Ch. D. 528; Dan. Ch. Pr. 5th ed. 386 *et seq.*

(*i*) A writ of attachment issued without notice will be discharged. *Dallas* v. *Glyn*, 3 Ch. D. 190.

(*k*) *Re Bell's Estate*, *Foster* v. *Bell*, L. R. 9 Eq. 172.

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the Order made under the Debtors Act, 1869 (*l*). It would, therefore, appear that strictly the method of procedure against officers of the Court (except the sheriff and other officers of the Courts of common law) is by committal, and not by attachment. This point will be referred to again *infra* (*m*).

Rules of court.

The rules of the Supreme Court have defined almost exhaustively the cases in which the writ of attachment will issue, and have laid down the conditions to be observed (*n*).

Recovery of property other than land or money.

By O. XLII. r. 6,—"A judgment for the recovery of any property, other than land or money, may be enforced:—

(a) By writ for delivery of the property:

(b) By writ of attachment (*o*):

(c) By writ of sequestration."

It is worthy of remark, that the phrase "by writ of attachment" here has been said to include attachment of a debt (*p*).

Injunction or *mandamus*.

By O. XLII. r. 7,—"A judgment requiring any person to do any act, other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment or by committal."

Payment of money into Court.

By O. XLII. r. 4,—"A judgment for the payment of money into Court may be enforced by writ of sequestration, or in cases in which attachment is authorized by law by attachment."

Order against a corporation.

By O. XLII. r. 31,—"Any judgment or order against

(*l*) See Morg. Ch. Acts, ed. 1876, p. 297.

(*m*) Page 264.

(*n*) The rules are not exclusive, that is to say, they do not limit the jurisdiction of the Court, and there may be cases for which they do not provide, where the writ is still issuable. See O. XLII. r. 28.

(*o*) It should be observed that this rule cannot impliedly limit the jurisdiction of the Court, so as to prevent process for attachment in proper cases where the judgment is for recovery of land or money. Seton on Decrees, 1556.

(*p*) Stephen, J., as reported in *Fellows* v. *Thornton*, 14 Q. B. D. p. 337.

a corporation wilfully disobeyed may, by leave of the Court or a judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property" (*q*).

Interrogatories.

By O. XXXI. r. 11,—"If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer, or answer further, either by affidavit or by *viva voce* examination, as the judge may direct."

Discovery.

By O. XXXI. r. 21,—"If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court or a judge for an order to that effect, and an order may be made accordingly."

The above rules having laid down upon what judgments and orders the writ will issue, we proceed to discuss the formalities which are to be observed in respect to such judgments and orders.

Entry of judgments and orders essential.

Before any step can be taken to enforce the judgments and orders above referred to by writ of attachment, they must be duly entered in accordance with O. XLI. r. 1, and Cons. O. XXXV. r. 32 (*r*). If no proper entry

(*q*) This rule is taken from sect. 33 of C. L. P. Act, 1860 (23 & 24 Vict. c. 126), which section is now repealed (46 & 47 Vict. c. 49). So long as the rule existed in substance, as a statutory enactment, its authority was undoubted. Perhaps, it is doubtful how far a mere *regula praxis* can affect the liberty of a subject, other than an officer of the Court. It is hardly a regulation relating to practice and procedure only. See sect. 17, Judicature Act, 1875.

(*r*) *Vide supra*, p. 30, and O. LII. r. 14, and O. LV. r. 74 a.

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is made, the motion for writ of attachment will be refused (*s*).

O. XLII. r. 19.

Fourteen days before issuing execution, except for land or money.

We have seen that by O. XLII. r. 19,—"A party who has obtained judgment or an order, not being a judgment for payment of money or costs, or for the recovery of land, may issue execution in *fourteen days*, unless the Court or a judge shall order execution to issue at an earlier or later date, with or without terms."

It may be questioned whether this rule applies at all to writs of attachment, for although they are included within the term writs of execution under O. XLII. r. 8, nevertheless, the heretofore existing rights to enforce every judgment and order are saved by rule 28 (*t*).

SUB-SECT. (ii).—*Formalities of the Judgment or Order in respect of which the Writ is issuable.*

Requirements of the judgment or order.

O. XLI. r. 5.

All judgments and orders enforceable by attachment (except injunctions) must comply with the terms of O. XLI. r. 5, whereby—"Every judgment or order, made in any cause or matter, requiring any person to do an act thereby ordered, shall state the time, or the time after the service of the judgment or order, within which the act is to be done; and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be indorsed a memorandum in the words or to the effect following, viz.:—

"If you, the within named A. B., neglect to obey this judgment (*or* order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment (*or* order)" (*u*).

No application to injunction.

This rule applies only to judgments and orders requiring a person to do some thing, and, therefore, does not apply to injunctions which are orders restraining a person from

(*s*) *Ballard* v. *Tomlinson*, 52 L. J. Ch. 656.

(*t*) *Vide supra*, p. 47.

(*u*) See Appendix, *infra*, for another form, p. 425, Form No. 65, and note.

doing specified acts. There is no difference in this respect, even where the operation of the injunction has been by order suspended for a definite time (*x*).

Nor to judgments and orders other than personal.

Further, the rule does not apply to judgments or orders, other than those which from their nature a person can be compelled by process of contempt to obey; and by process of contempt is meant both personal process, like the writ of attachment, and the stringent process against property, called the writ of sequestration (*y*).

Time to be stated in the judgment order.

As to the time which is to be stated by the judgment or order, "forthwith" is sufficient to enable a motion in default of obedience to be made (*z*). If the time within which the act to be done is not stated, either by the expression "forthwith" or otherwise, the judgment or order is not bad, or altogether ineffectual, but requires an order to be made fixing a day for its performance before it can be enforced by process for contempt (*a*).

Judgment or order to be precise.

Not only in the matter of time, expressly provided for by O. XLI. r. 5, but also in its terms, the judgment or order must be clear and precise as to the acts to be done or restrained.

There are numerous authorities at law to show that the writ of attachment cannot be put in force to recover money where payment of a precise or ascertainable sum is not

(*x*) *Vide Selous* v. *Croydon Local Board*, W. N. 1885, 105.

(*y*) This, it is suggested, is the true limitation of the general words of the rule. A *fi. fa.* cannot be set aside on the ground that the judgment on which it is issued has not been served, and does not bear the indorsement prescribed. *Land Credit Co. of Ireland* v. *Fermoy*, L. R. 5 Ch. 323. See, as to order for payment of solicitor's costs, *In re* —— (*A Solicitor*), W. N. 1884, 217.

(*z*) *Thomas* v. *Nokes*, L. R. 6 Eq. 521. The case itself was an application that the Clerks of Records and Writs should be ordered to issue an attachment, they having felt a difficulty as to compliance with Cons. O. XXIII. r. 10, then in force.

(*a*) *Needham* v. *Needham*, 1 Ha. 633; *Gilbert* v. *Endean*, 9 Ch. D. p. 266. Similarly, a motion may be made to fix time and place which do not appear when they should in an order for specific performance. *Morley* v. *Clavering*, 30 Beav. 108.

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directly ordered; as, for instance, where the order is that a party be at liberty to amend on payment of costs (*b*). But this rule does not apply to an interlocutory order for payment into Court; and an objection taken to a motion for attachment, that the order it was sought to enforce contained no adjudication of liability, was overruled (*c*).

Indorsement on the judgment or order.

The indorsement required by the rule is a matter of old practice, that is to say, a similar indorsement has always been requisite. The precise form has somewhat varied (*d*), and is not now so material as it formerly was (*e*). It is, however, essential that the indorsement should correctly state the consequence of a default in obeying it (*f*); and, perhaps, this is the test whether, in this particular, the rule has been complied with (*g*).

Order under the exceptions in sect. 4, Debtors Act, 1869.

In the cases where the judgment or order is for payment of money, but being within the exceptions contained in sect. 4 of the Debtors Act, 1869, is enforceable by process for contempt, it must show on its face sufficient to justify an imprisonment under it (*h*). The indorsement is essential, even in cases where service on the parties' solicitor is made by O. XXXI. r. 22, equivalent to personal service (*i*).

The service of the judgment or order.

Strict personal service of the judgment or order is required, and is not waived by the party against whom it is

(*b*) *Rese* v. *Fenn*, 2 Dowl. 182; *Field* v. *Sawyer*, 6 C. B. 71; *Turner* v. *Gill*, 3 Dowl. 30; *Hendy* v. *Collett*, 7 Dowl. 599. The contempt for non-payment of costs, in cases where it arose, was upon the undertaking of the party to pay them, which had to be made a rule of court. *Harrison* v. *Ward*, 3 Dowl. 541; *Price* v. *Phileox*, 7 Dowl. 559.

(*c*) *Hutchinson* v. *Hartmont*, W. N. 1887, 29.

(*d*) Cons. O. XXIII. r. 10; Rules and Orders under Debtors Act, 1869. *Vide* Morg. Ch. Acts, 5th ed. p. 296.

(*e*) As to the practice before the Rules of Court of 1883, see *Thomas* v. *Palin*, 21 Ch. D. 360; *Wallace* v. *Graham*, 11 L. R. Ir. 369.

(*f*) See *Hinde* v. *Blake*, 5 Beav. 431.

(*g*) *Treherne* v. *Dale*, 27 Ch. D. 66, where the indorsement was in the old form.

(*h*) *In re Byrne*, 6 L. R. Ir. 455.

(*i*) *Hampden* v. *Wallis*, 26 Ch. D. 746.

made promising to perform the act enjoined thereby (*k*). "Strict personal service" means that the person against whom the judgment or order is directed must have delivered to him a true copy (*l*) of the judgment or order with its indorsement, and at the same time the original judgment or order must be produced and shown to him (*m*). It is not sufficient to show an office copy, for O. LXVII. r. 1, is express that, except in the case of an order for attachment (*n*), it shall not be necessary to the regular service of an order that the original be shown, if an office copy of it be exhibited.

O. LXVII. r. 1.

Injunction.

We shall see shortly that personal service of an injunction or order to abstain from doing anything is not necessary to found an application for an order of committal. It is sufficient in such case if the terms of the injunction can be proved to have come to the knowledge of the person against whom it is directed. The practice is the same where it is sought to obtain a writ of attachment against a person for breach of an injunction; proof of personal service of that injunction is not always necessary.

Discovery.

Again, an order for discovery need not be served personally in the case where the *party* against whom it is made is represented by a solicitor, for by O. XXXI. r. 22,— "Service of an order for interrogatories or discovery or inspection, made against any party on his solicitor, shall be sufficient service on which to found an application for an attachment for disobedience to the order (*o*). But the party against whom the application for attachment is made may show in answer to the application that he has had no notice or knowledge of the order."

O. XXXI. r. 22.

(*k*) *Re Cunningham*, W. N. 1886, 197.

(*l*) *Re Holt*, 11 Ch. D. 168, where the copy was deficient in not being fully intituled, and the attachment was discharged.

(*m*) *Query*, whether the party served can demand to examine the original. See *Woodward* v. *Earl of Lincoln*, 3 Swanst. 626.

(*n*) The words "order for attachment" appear to mean the order made giving leave to issue the writ.

(*o*) *Joy* v. *Hadley*, 22 Ch. D. 571.

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In other cases personal service essential.

The terms of O. XLI. r. 5, which we have just now referred to, are very wide and require, with the exceptions above referred to, service on the person of every judgment or order to do an act. Apart from that rule, altogether, and as well-established practice, it has long been a principle that personal service of all decrees and orders of which disobedience is a contempt is necessary (*q*).

Irregular service.

Where there has been an irregularity in the service, for example, where the judgment or order has been served without the proper indorsement, the service may be effected over again (*r*).

Substituted service.

O. LXVII. r. 6.

Where it is shown that the person is avoiding service, an order for substituted service will be made (*q*). At the present time, substituted service is provided for by O. LXVII. r. 6, by which,—"Where personal service of any writ, notice, pleading, summons, order, warrant, or other document, proceeding or written communication is required by these rules or otherwise, and it is made to appear to the Court or a judge that prompt personal service cannot be effected, the Court or judge may make such order for substituted or other service, or for the substitution of notice for service by letter, public advertisement, or otherwise, as may be just" (*s*).

Appearance of counsel a waiver.

Appearance of counsel on an application for leave is, if he consent to any step thereunder, such as an adjournment, a waiver of any irregularity, in the service of the notice of motion (*t*).

Time within which personal service must be made.

Where personal service is required, it must be made before the time limited; subsequent service is irregular, and proceedings taken thereon will be set aside (*u*).

(*q*) *Rider* v. *Kidder*, 12 Ves. 202; *Re Lloyd*, 10 Beav. 451. Note to Morg. Ch. Acts, 4th ed. 490, n. (*e*), for old authorities.

(*r*) *Re Gregg*, *Re Prance*, L. R. 9 Eq. 137; *Re Bowen*, 9 Jur. N. S. 612.

(*s*) Dan. Ch. Pr. 878. For Form of Order, see Appendix, *infra*, No. 66.

(*t*) *Ex parte Alcock*, L. R. 1 C. P. D. 68.

(*u*) *Adkins* v. *Bliss*, 2 De G. & J. 286; *Duffield* v. *Elwes*, 2 Beav. 268. See *Re Gregg*, *Re Prance*, L. R. 9 Eq. 137.

SUB-SECT. (iii).—*The Motion for Leave to issue the Writ.*

Having dealt with the formalities with respect to the judgment or order upon which a writ of attachment is issued, we proceed to investigate the rules and practice relating to its issue.

Application for writ, how made.

The application for leave to issue the writ under O. XLIV. r. 2, above referred to, is made either by motion in Court (*x*) or by summons in chambers. In the Chancery Division the application must be made by motion (*y*), and this is the case wherever the judgment or order, to enforce which the writ is applied for, may have been made. In the Queen's Bench Division, where the judgment or order has been made in Court, the application should be also made by motion to the Court; but where it has been made in chambers, a summons may be issued, returnable before the judge in chambers. This exercise of jurisdiction by the judge sitting in chambers is authorized by the judicial construction which has been placed upon sect. 39 of the Judicature Act, 1873 (*z*).

Leave necessary in all cases.

Discovery.

The point has been raised that it is only necessary to obtain leave in those cases mentioned in O. LII. r. 2, where a writ could be applied for at common law; but the contention was not sustained, and the rule was held to apply to contempt of an order for discovery, a distinctly equitable matter (*a*).

Attachment against sheriff.

The old rule absolute in the first instance for an attachment against the sheriff cannot now be made, nor can any similar proceeding be taken. The above O. XLIV. r. 2, applies, and notice must be given to him in the same way as to other persons liable to attachment (*b*).

(*x*) O. LII. rr. 1, 2. The motion is intituled in the action or matter. *Masters* v. *Lowther*, 11 C. B. N. S. 948.

(*y*) *Knight* v. *Gardiner*, W. N. 1883, 162, V.-C. B.; and see O. LV. r. 2.

(*z*) O. XXXI. r. 21, *supra*, p. 233. *Litchfield* v. *Jones*, 25 Ch. D. 64.

(*a*) *Salon Kyrburg* v. *Posnanski*, 13 Q. B. D. 218; *Amstell* v. *Lesser*, 16 Q. B. D. 187, per Wills, J.

(*b*) *Jupp* v. *Cooper*, 5 C. P. D. 26; *Eynde* v. *Gould*, 9 Q. B. D.

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Requisites of the notice of motion.

The notice required by O. XLIV. r. 2, is the ordinary notice of motion, which, however, must comply with O. LII. r. 4, whereby "Every notice of motion . . . for attachment . . . shall state in general terms the grounds of the application; and where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion" (*c*). There must, as in the case of other motions, be two clear days between the service of the notice of motion and the day named in the notice for hearing the motion (*d*). The requirement that the notice of motion should state in general terms the grounds of the application is complied with, if it refers to default in obedience of the order or orders served therewith (*e*).

Motion day.

Care must be taken to name a proper motion day in the notice.

The copies affidavits to be served with the notice of motion.

The service of the copies affidavits with the notice of motion is required by the rule (O. LII. r. 4), but the omission to serve the copies simultaneously with the notice is a trifling irregularity merely. Where, therefore, the rule is substantially complied with by the service of the copies two clear days before the day for which notice has been given, an objection on the technical ground will be disregarded (*f*). Affidavits relating to procedure merely, for example, an affidavit of service, need not, perhaps, be served under this rule (*g*). Though where the contemnor

335. There was another case where a rule was absolute in the first instance, viz., for non-payment of costs on a master's allocatur. See Ch. Arch. 13th ed. 1390, n. (*p*). Such an order could not now be made for the reason of the Debtors Act, 1869.

(*c*) It need hardly be observed that the person moving cannot demand, on service of these copies, that he should be paid for them, the provisions of O. LXVI. r. 7 (*h*), (*i*), do not apply to this case.

(*d*) O. LII. r. 5.

(*e*) *Treherne* v. *Dale*, 27 Ch. D. 66.

(*f*) *Hampden* v. *Wallis*, 26 Ch. D. 746, per Chitty, J.

(*g*) *Whitham* v. *Whitham*, W. N. 1885, 176; *Schirges* v. *Schirges*, W. N. 1886, 85; *Re Wyggeston Arbitration*, 33 W. R. 551. But it is clearly an irregularity, although not rendering the proceedings void. O. LXX. r. 1; *Petty* v. *Daniel*, 34 Ch. D. 172.

does not appear on the hearing of the motion, the order for writ of attachment has been refused on this ground (*h*). Again, where the copy of an affidavit, which the notice stated was to be read in support of the motion, was not served, the motion was ordered to stand over (*i*).

Affidavits to be served in same place as notice.

It is an irregularity to serve the notice of motion on the London agent, and the copies affidavits on the country solicitor, but this does not render the proceedings necessarily ineffectual (*k*).

Service of the notice of motion.

The notice of motion need not be served personally. Where the motion is intended to be made in an action, service of the notice on the solicitor on the record is treated as service on the party. O. XLIV. r. 2, enjoins simply "notice to the party," which in this case does not mean personal service on him (*l*). The usual method of service, where personal service is not required, is sufficient here, so that, where there is no solicitor on the record, the notice may be served by leaving it at the residence of the respondent to the motion (*m*).

O. XLIV. r. 2.

Where the application for a writ is not made in an action, it is clear that there is no solicitor upon the record upon whom service can be made; the notice must then be served upon the respondent (*n*).

(*h*) North, J., in *Re Lysaght*, W. N. (1887), 23. The notice of motion in this case stated that the affidavit would be read in support of the motion.

(*i*) Not expressly to enable the applicant to serve the copy, but for another purpose. *Litchfield* v. *Jones*, 25 Ch. D. 64.

(*k*) *Petty* v. *Daniel*, 34 Ch. D. 172.

(*l*) *Browning* v. *Sabin*, 5 Ch. D. 511; *In re A Solicitor*, 14 Ch. D. 152, in which latter case it was said that, in a suit, service on the solicitor was always treated as service on the party. These are both decisions of Jessel, M. R. See, also, O. LXVII. r. 2; *Joy* v. *Hadley*, 22 Ch. D. 571; *Howarth* v. *Howarth*, 11 P. D. 95, in C. A. Bacon, V.-C., seems, however, to have considered that personal service of the notice of motion must have been made upon the person in contempt, unless evidence was given that he could not be found. *Mann* v. *Perry*, 50 L. J. Ch. 251; 44 L. T. N. S. 248; *Richards* v. *Kitchen*, 25 W. R. 602.

(*m*) *In re A Solicitor*, 14 Ch. D. 152.

(*n*) *Howarth* v. *Howarth*, 11 P. D. 95.

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The formal evidence to be adduced on the motion is as follows:—

Judgment or order, and affidavit of service.

Production must be made of the judgment or order (*o*) which it is sought to enforce, and proof of its service. The affidavit of service for this purpose should be precise as to the person served, and as to the date and place of service. It must also state that the order sought to be enforced has been served duly indorsed (*p*). There is also required an affidavit of service of the notice of motion, which should in like manner be precise in matters of detail.

Substantive evidence in support of application for leave to issue.

The substantive evidence in support of the application must show distinctly what the disobedience is, which is only another form of stating that this, like every other motion, must be supported by sufficient grounds (*q*). It is a refinement, but appears true in principle, to say that, where the applicant has a right to a writ of attachment to compel obedience, proof of the fact of non-compliance with the judgment is sufficient, though where a writ of attachment is demanded, so that the dignity of the Court may be vindicated, proof of the intentional disrespect to the Court must be shown.

Contemnor showing cause against motion.

The person against whom the writ is asked may, of course, show cause against the motion. It is here that technical objections are of more avail than perhaps in any other class of cases, and it is always open to the respondent to take them (*r*). There seems to be, however, an increasing disposition on the part of some of the judges to treat

(*o*) Or an office copy thereof. O. XXXVII. r. 4.

(*p*) It is not necessary to make the judgment or order an exhibit, but it should be fully identified by the affidavit.

(*q*) A good instance of the strict proof required by the Court on some motions for an attachment will be found in Tayl. Ev. p. 1079, in the case where a witness has committed a contempt of court in not attending upon a subpœna.

(*r*) See the objections in such cases as *Lowten* v. *Mayor of Colchester*, 2 Mer. 395; *Bennett* v. *Button*, *ibid.* 400; *Re Holt*, 11 Ch. D. 168. *Vide infra*, p. 244.

irregularity, even in cases relating to the liberty of the subject, as capable of amendment, and to sustain orders for attachment, notwithstanding that they have been obtained on irregular proceedings (*s*). This tendency of recent practice, in the opinion of the writer, is to be regretted. Where no technical objections are open to the respondent, and he proposes to fight the motion on the merits of the matter, his evidence should be directed to showing that there has in fact been no disobedience or contempt committed by him. For, by reason of the principle that the applicant has, in case of disobedience, a right to the writ, it will not avail if the respondent simply endeavours to excuse himself (*t*). However, if some good and valid excuse be shown, even where the Court has no discretion, it would probably, by means of adjourning the motion, or in some other way, give the respondent a chance of obeying the judgment. The fact of other methods of execution being available undoubtedly weighs with the Court, and therefore, if possible, the contemnor should show that there is some other pertinent relief (*u*). The respondent's evidence will be considered and weighed by the Court, which is, of course, at liberty to disbelieve the tale he tells (*x*).

Where, however, the respondent relies on a technical error in respect to the service, he should not appear on the motion, for his appearance might be construed as a waiver; but he should subsequently move to discharge the order for attachment, if it be made (*y*).

The order made, if the application is granted, is in the

(*s*) See *Petty* v. *Daniel*, 34 Ch. D. 172.

(*t*) Principle of *Barlee* v. *Barlee*, 1 Add. 301; *Evans* v. *Bear*, L. R. 10 Ch. 76.

(*u*) See the reasons influencing Fry, J., in the analogous case of a sequestration, *Snow* v. *Bolton*, 17 Ch. D. 433.

(*x*) *Treherne* v. *Dale*, 27 Ch. D. 66. See also, at common law, *Re Crossley*, 6 T. R. 701.

(*y*) *Levi* v. *Duncombe*, 1 C. M. & R. 737; *Harvey* v. *Hall*, L. R. 11 Eq. 31. But see *Biddulph* v. *Gray*, 5 Dowl. 406; *Heywood* v. *Wait*, 18 W. R. 205.

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form that the applicant "be at liberty to issue" a writ of attachment (*z*), thus preserving the true nature of the remedy, that it is a relief granted by way of execution to the applicant.

Intitulation of proceedings.

The intitulation of the proceedings to attachment is frequently of most material importance. The judgment or order which it is sought to enforce must correspond strictly in its heading with the proceedings of which it is the result, and the copy of such judgment or order served on the offending party must be in this respect exact (*a*). The order for the issue of the writ and the writ itself must in like manner correspond exactly with the other proceedings.

Amendment.

Where such an error has been made, however, it may be amended, in some cases, on an application to the Court (*b*).

Costs of attachment.

The costs of an attachment, including the costs of motion for leave to issue, are in the discretion of the Court under O. LXV. r. 1, and should be asked for on the application for the writ (*c*). These costs are, in flagrant cases, ordered to be paid as between solicitor and client (*d*).

Sect. 2.—Effect of the Writ.

O. XLIV. r. 1. Effect of writ.

By O. XLIV. r. 1, "A writ of attachment shall have the same effect as a writ of attachment issued out of the Chancery Division has heretofore had."

Direction of writ.

The writ is directed to the sheriff, and the same general rules with reference to its return and the liabilities of the

(*z*) See Appendix, *infra*, p. 426, Form Nos. 68, 69; Seton, 1563—65; Ch. Forms, p. 475.

(*a*) *Re Holt*, 11 Ch. D. 168.

(*b*) *Lowten* v. *Mayor of Colchester*, 2 Mer. 395; and *Bennett* v. *Button*, *ibid.* 400, where the order was made only on payment of all costs occasioned by the error, which was of apparently a trivial character.

(*c*) *Abud* v. *Riches*, 2 Ch. D. 528.

(*d*) *Tilney* v. *Stansfield*, 28 W. R. 582. And see, in a case of gross contempt, *Beall* v. *Smith*, L. R. 9 Ch. 85.

sheriff for breaches of duty under the mandate apply, as we have seen, in other cases (*e*).

The writ itself should, it is said, be written or printed on parchment (*f*). It is considered as issued on the first moment of the day on which it issues (*g*). It must be indorsed with a recital of the particular contempt in respect of which it is issued (*h*).

Sub-sect. (i).—*The Arrest under the Writ.*

Authority given by the writ.

The mandatory part of the writ is:—"We command you to attach *C. D.* so as to have him before us in the Division of our High Court of Justice, &c." By this the sheriff is authorized to seize or arrest the person sought to be attached. No action of assault for such arrest can, therefore, be brought against him, the writ being his justification. There is no limitation as to the time of the day or night when the arrest can lawfully be made, but an arrest made on a Sunday is bad (*i*).

Application of *Semayne's case.*

The sheriff may, in the execution of a writ of attachment, break open the outer doors of a house. This is at any rate true where the contempt is disobedience of an order in the nature of a mandamus or injunction, and not for the payment of money. For example, the sheriff must break in and arrest a person who has disobeyed an order to produce deeds (*k*).

(*e*) Book I., Chaps. I. and II., *supra.*

(*f*) Braithwaite's Pr. 133. See generally, 1 Dan. Ch. Pr. 6th ed. 883.

(*g*) *Stephens* v. *Neale*, 1 Mad. 550.

(*h*) Forms of these indorsements can be found in Braithwaite's Pr. 167 *et seq.*

(*i*) By the Lord's Day Act, 29 Car. 2, c. 7, s. 6. *M'Ilcham* v. *Smith*, 8 T. R. 86; *The King* v. *Myers*, 1 T. R. 265. It was at one time questioned whether this enactment applied to a tipstaff acting under the Lord Chancellor's warrant, though the statute seems, clearly enough, to avoid an arrest, even by him. *Ex parte Whitehurch*, 1 Atk. 58. See, also, judgment of Mr. Justice Bayley in *Burdett* v. *Abbott*, 14 East, p. 162; *Samuel* v. *Buller*, 1 Ex. 439.

(*k*) *Harvey* v. *Harvey*, 26 Ch. D. 644.

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The case of privilege from arrest is analogous to that of a closed house, so that such a privilege will not protect a contemnor from arrest where the order has been made against him punitively (*h*).

It is a constitutional principle, that there is a clear distinction in law between the cases where goods are taken under a *fi. fa.*, and where the body of the debtor is taken under a *ca. sa.*; for although the goods may be retained on an illegal seizure, the body cannot be detained on an illegal arrest (*i*); but this principle, apparently for the reasons we have mentioned, has no application to a writ of attachment.

Sub-sect. (ii).—*Imprisonment under the Writ.*

Attachment bailable process.

The sheriff imprisons the contemnor under the writ so as to have him safe in his custody. Since the Debtors Act, 1869, the point is very unlikely to arise, but it is clear that a writ of attachment is a bailable process (*j*), and the sheriff may, if he chooses, take security for the performance of the duty, but he is not compellable so to do (*k*). The sheriff is certainly not responsible in damages if the attached person is in Court to answer the contempt in accordance with the exigency of the writ (*l*); and it is of no consequence if such person has been free in the meantime.

Sheriff's duties on arrest.

By sect. 14 of 50 & 51 Vict. c. 55, provisions are made for the duties of sheriffs' and other officers upon the arrest of persons by virtue of any action, writ, or attachment for debt (*m*).

(*h*) *In re Freston*, 11 Q. B. D. 545; *In re Dudley*, 12 Q. B. D. 44.

(*i*) *Hooper* v. *Lane*, 6 H. L. C. 443, p. 482, Mr. Justice Crowder; 1 S. L. C. 8th ed. pp. 128, 129; 9th ed. 129, 130.

(*j*) *Danby* v. *Lawson*, Prec. in Ch. 110; *Morris* v. *Hayward*, 6 Taunt. 569; Dan. Ch. Pr. 887.

(*k*) *Studd* v. *Acton*, 1 H. Bl. 468.

(*l*) *Lewis* v. *Morland*, 2 B. & Ald. 56.

(*m*) See section in the Act, Appendix III. p. 471, *infra*.

The writ of attachment, even when executed by the arrest and imprisonment of the contemnor, in no wise operates as a discharge to him (*n*); his compliance with the order must be full and complete (*o*).

Situation of contemnor when imprisoned.

When attached and imprisoned a person does not become a criminal prisoner (*p*). He is to be treated as a misdemeanant of the first division, within the meaning of sect. 67 of the Prisons Act, 1865 (*q*). He is a prisoner within the meaning of the Prisons Act, 1877 (*r*), and the Secretary of State has, therefore, power to make rules to secure such unrestricted and private communication between him, his solicitor, and his friends, as may be possible, having regard only to the necessity of preventing any tampering with evidence, or any plans for escape, or other like considerations (*s*). The rules of the prison with reference to the same matter are apparently made in pursuance of certain regulations contained in the schedule to the Prisons Act, 1865 (*t*).

Sub-sect. (iii).—*Detainer under a second Writ.*

Whether person attached wrongly can be attached under subsequent process.

As in the case of every other execution, the writ is the justification for the act of the sheriff, and so long as the writ stands, the person arrested under it is lawfully detained in custody. If, therefore, any other attachment is issued against him, it can be executed (if at all) by detain-

(*n*) *Reg.* v. *Hemsworth*, 3 C. B. 745.

(*o*) *Reg.* v. *Weston*, 8 Jur. 1122; *Vide supra*, p. 226.

(*p*) Though a person committed to prison summarily for acting as a solicitor when he was unqualified is a criminal prisoner. *Osborne* v. *Milman*, 18 Q. B. D. 471.

(*q*) 28 & 29 Vict. c. 126; 40 & 41 Vict. c. 21, s. 41. There are certain statutable regulations as to quarterly returns to the Lord Chancellor of all persons in prison for contempt, with particulars of the nature of their contempts. Quarterly visitations of persons so imprisoned are also enjoined. See 11 Geo. IV. & 1 Will. IV. c. 36, ss. 2, 15, rr. 7, 8.

(*r*) 40 & 41 Vict. c. 21, s. 57.

(*s*) Under 40 & 41 Vict. c. 21, s. 39.

(*t*) See especially rules 54, 55.

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ing him (*u*). The question of the legality of such detainer is in some cases difficult to answer. Where the first writ executed against him has been obtained irregularly, and, therefore, illegally, his arrest, though lawful so far as regards the sheriff, is unlawful so far as regards the party who obtained the writ to be issued, and that party cannot take advantage of his own wrong by causing a second writ to be put into execution, and the contemnor to be detained thereunder (*x*). But on the general question whether the detention would be legal under a second writ issued by a third party, it is important to distinguish between the nature of the contempt for which it is issued. Where the contempt is a special contempt, the principles applied by the Court are entirely different from those having prevailing weight, where the process of attachment is issued by one party in the way of execution against another. For example, the privilege from arrest which a solicitor enjoys when pursuing his business in going to and from a court of justice, does not protect him when he disobeys an order of the Court made against him in his character of solicitor (*y*). On the other hand, it was held in Chancery, notwithstanding conflicting decisions at law, that where a debtor had been arrested under a *ca. sa.* illegally issued, his detention under a subsequent *ca. sa.* was unlawful (*z*). And the distinction is otherwise clearly marked between the principles guiding the Court in civil cases, where the remedy of attachment is said to be equivalent to a *capias* for enforcing the judgment of a Court of common law, and in cases where the attachment issues for the purpose of forcing a person to do his duty under the law (*a*). Shortly, the question of the extent to which a wrongful imprisonment

Solicitor's privilege from arrest.

(*u*) As in *Trotter* v. *Trotter*, Jac. 533.

(*x*) *Hall* v. *Hawkins*, 4 M. & W. 590; *Egginton's case*, 2 El. & Bl. 717.

(*y*) *In re Freston*, 11 Q. B. D 545.

(*z*) *Ex parte Freston*, 30 L. J. Ch. 460; *Bateman* v. *Freston*, 30 L. J. Q. B. 133; *Chapman* v. *Freston*, 30 L. J. Ex. 89. The authorities are fully referred to in these cases.

(*a*) Judgment of Brett, L. J., in *In re Freston*, 11 Q. B. D. 545.

under an attachment privileges the prisoner from detention on other civil process may be said to be doubtful.

SUB-SECT. (iv).—*Returns to the Writ.—Serjeant-at-Arms.*

Returns to writ.

The usual returns to a writ of attachment are *cepi corpus*, attached and sent to prison, *non est inventus*, and sick and ill, but in custody in his house (*b*). These returns are of the simplest nature, and do not call for an investigation similar to that we gave to the returns to writs of *fi. fa.*

Non est inventus, and application for serjeant-at-arms.

Reference should, however, be made to the effect of the return "*non est inventus* in my bailiwick." On this return being made, if the party prosecuting the contempt desires, he can apply for an order for the serjeant-at-arms (*c*). This order is obtained on an *ex parte* motion, the evidence in support of which is, the order for writ of attachment to issue, the writ of attachment, and the sheriff's return. This mode of proceeding is preserved by the general terms of O. XLII. r. 28, which enacts that "nothing in this order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner, or against any person or property whatsoever."

Serjeant-at-arms.

Serjeants-at-arms are officers of the Crown, whose duty is nominally to attend the person of the sovereign, to arrest traitors, and the like. One of these officials (by the sovereign's allowance) attends on the Lord Chancellor, and thus, under the terms of sect. 77 of the Judicature Act, 1873, becomes attached to the Supreme Court (*d*).

Cons. O. XXX. r. 2.

"Upon the order for the serjeant-at-arms being granted, the registrar is, on request, to draw up the order and deliver

(*b*) Almost the same as in the case of a *ca. sa.* See Chitty's Forms, p. 438. As to old practice on return of *languidus*, bill taken *pro confesso*, *Culley* v. *Buttifant*, 1 Ch. D. 84. See Appendix, *infra*, Forms Nos. 70—73.

(*c*) Cons. O. XXIX. r. 3. Form of Order, Appendix, *infra*, No. 74.

(*d*) Sweet's Law Dictionary—Serjeants-at-Arms. The note is appended that the office of serjeant-at-arms attending on the Lord Chancellor is the same person as the serjeant-at-arms of the House of Lords. The office of serjeant-at-arms has no connection with that of tipstaff. Hinde, Ch. Pr. 123.

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the same to the serjeant-at-arms, or his deputy, who shall thereupon endeavour to apprehend the party prosecuted, and bring him before the Court. But if he cannot, no such order for a serjeant-at-arms shall be discharged, nor the contempt thereupon, without a certificate under the hand of the serjeant-at-arms that his fees have been paid. And after the said order shall have been so drawn up and passed, no private or other agreement shall be made between the party prosecuting the contempt and the person standing in contempt, or on their behalf, for a compromise of the suit or the discharge of the contempt, unless such satisfaction shall be made, and a certificate thereof shall be produced to the Court" (*e*). The serjeant-at-arms, in order to execute process, obtains the Lord Chancellor's warrant, and a person committed or brought up by the serjeant-at-arms for breach of a decree or order cannot be released until he has performed the decree or order in all things that are to be immediately performed, and given such security as the Court shall direct to perform the other parts of the decree or order (if any) at the future days and times thereby appointed (*f*).

This is the most stringent process for enforcing contempt against the person which is known to the Courts, as it stops all possibility of compromising the action until the fees of the serjeant-at-arms have been paid. Practically, it is seldom, if ever, resorted to. The writ of attachment, or successive writs of attachment, fulfil the necessities of most cases (*g*).

Sub-sect. (v).—*Discharge of the Order for Writ.*

Motion to discharge order for writ.

Where any irregularity has taken place in obtaining the order for the issue of the writ of attachment, the party

(*e*) Cons. O. XXX. r. 2.

(*f*) Cons. O. XXIX. r. 4.

(*g*) The practice is to be found in Morg. Ch. Acts and Orders, 4th ed. p. 513 *et seq.*; Dan. Ch. Pr. 6th ed. 889 *et seq.*; Dan. Forms, 1007 *et seq.*

prosecuted can at once move, on notice, to discharge it (*h*). Where the original judgment or order, for disobedience of which the writ has issued, has been wrongly or irregularly made, proceedings must of course be taken by appeal, or otherwise, to set that judgment or order aside. The motion to discharge the order for the writ is based on distinct and entirely different grounds. The mere fact that the party prosecuted is in gaol makes of course no difference to his capacity to move, nor to his right to be heard (*i*). The order he applies for, if in custody, is not only that the order to issue the writ be set aside, but that he also be discharged (*k*). The motion for discharge of a prisoner from custody has priority over all other motions (*l*).

Contemnor in custody.

Priority of motion.

A trifling irregularity will suffice for the motion (*m*); for example, where the writ was sued out for a sum greater by a small amount than was due (*n*); though, perhaps, where the writ is sued out against the contemnor in a wrong name, in accordance with the judgment or order which is also wrong, the arrest is good (*o*).

What irregularity suffices.

If the order is discharged, the writ becomes invalid; but, as we have seen, the sheriff is not liable in damages, the writ, and not the order, being his justification. The party prosecuting is responsible, technically, in damages, and it is in the discretion of the Court to grant an inquiry as to them (*p*). Leave to bring an action in respect of the

Effect of order being discharged.

(*h*) Forms of notice of motion and order, Appendix, *infra*, Nos. 75, 76. At common law the application was by rule *nisi*. For an example, *Reg.* v. *Burgess*, 8 A. & E. 275.

(*i*) Though it seems doubtful whether a *habeas corpus* can be issued to enable him to be brought up to move in person. *Ford* v. *Nassau*, 1 Dowl. N. S. 631.

(*k*) Seton, 1595; Dan. Forms, 1017 *et seq.*; *Petty* v. *Daniel*, 34 Ch. D. 172.

(*l*) *Ashton* v. *Shorrock*, 29 W. R. 117.

(*m*) *Mackensie* v. *Mackensie*, 5 De G. & S. p. 342; *Re Reynolds*, 10 W. R. 709, where reference is made to authorities at common law. *Re Holt*, 11 Ch. D. 168.

(*n*) *Daniel* v. *Bishop*, M'Clel. 61.

(*o*) *Fisher* v. *Magnay*, 6 Sc. N. R. 588, a case under a *ca. sa.*

(*p*) *Re Reynolds*, 10 W. R. 709, where inquiry refused. *In re Bryant*, 4 Ch. D. 98; *Dallas* v. *Glyn*, 46 L. J. Ch. 51.

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wrongful execution is necessary (*q*). Formerly, the writ alone was discharged; now it is the order giving leave to issue the writ which is set aside.

Motion for setting aside to be made before fresh step taken.

With respect to the motion for setting aside the order as irregular, it must be remembered that by O. LXX. r. 2, no application to set aside any proceeding for irregularity shall be allowed, unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity (*r*). Further, by O. LXX. r. 3,—

Notice of motion to disclose objections precisely.

"Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the summons or notice of motion." The statement must be precise; for example, it should allege, if that is meant to be an irregularity relied on, that the service of the affidavits in support of the motion for order for issue of writ was not made at the proper place (*s*).

Objection to substantive order to be alleged by appeal.

So long as the judgment or order under which a contumacious person is attached stands, and is unobeyed, he remains in contempt. If, therefore, the objection is that the judgment or order is wrong, he must get it varied or set aside, either in the Court where it was made, or on appeal. Where there is any irregularity, either on the face of the judgment or order, or in the service of it, or in the process which we have been discussing, the contemnor applies to the Court which ordered the writ of attachment to issue to set the order and writ aside.

Sub-sect. (vi).—*Habeas Corpus.*

Habeas corpus.

This part of our subject would be incomplete without a reference being made to the writ of *habeas corpus*, and the position of the person attached, with relation thereto. This writ, although issuable as of right by any person, or

(*q*) *Goucher* v. *Clayton*, 14 L. T. N. S. 494; *Whitehead* v. *Lynes*, 34 Beav. 161.

(*r*) The appearance of the defendant is a "fresh step" within this rule. *Mulckern* v. *Doerks*, 53 L. J. Q. B. 526.

(*s*) *Petty* v. *Daniel*, 34 Ch. D. 172, where other examples can be found.

on behalf of any person who is imprisoned, is not issued except on reasonable cause shown, that is to say, an *ex parte* application must be made for it, and the reasonable cause then shown (*t*).

The various kinds of *habeas corpus*.

There are various kinds of writs of *habeas corpus* classified according to the purpose for which, in the administration of justice, they are required (*u*). With the prerogative writ of *habeas corpus*, which runs in all cases of illegal confinement, and orders the production of the prisoner, with the day and cause of his caption, before the Court to abide the order of the Court, we have nothing to do. It is clear that where the imprisonment is under a judgment or order for commitment, or under a writ of attachment, issued in pursuance of the power of a Court of competent jurisdiction, this prerogative writ will not be granted (*x*) ; otherwise one Court, now one Division of the High Court, might stultify the proceedings of another. But there are many purposes for which a person may desire, and may have a right, to be brought before the Court besides inquiring into the legality of his arrest, or the jurisdiction of the Court which has committed or attached him. The general nature of the purposes for which the writ will issue is sufficiently indicated by the names by which, under different circumstances, the writ is known, *e.g.*, *ad satisfaciendum*, *ad testificandum*, *deliberandum*, &c. (*y*), and, broadly, by the statement that the writ is necessary, where the person in contempt desires himself to be brought before the Court in reference to his contempt (*z*). There are numerous instances to be

(*t*) *Hobhouse's case*, 3 B. & Ald. 420, which is decided upon the principles of the opinion of Wilmot, C. J., given to the House of Lords. "There is no such thing in the law as writs of grace and favour issuing from the judges. They are all writs of right, but they are not all writs of course."

(*u*) 3 Bl. Com. ed. 1876, 123.

(*x*) *Burdett* v. *Abbott*, 5 Dow. 165, p. 199; *Ex parte Fernandez*, 31 L. J. C. P. 321; *Anon.*, Cro. Car. 579; *Bethell's case*, 1 Salk. 348; *In re Dunn*, 5 C. B. 215.

(*y*) 3 Bl. Com. ed. 1876, 123.

(*z*) Seton, 1574. For forms, see Appendix, *infra*, Nos. 77—79.

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found of applications for the writ under different circumstances (*z*).

Return to *habeas corpus*.

On the writ being returned by the sheriff, the whole of the justification which he has for the custody and detention will appear in the return itself. It is, therefore, perfectly competent for the contemnor to raise before the Court which has committed or attached him the legality of his arrest, and in this manner obtain his discharge (*a*).

The application for the writ should be made to the Division of the High Court, the order of which has been disobeyed (*b*).

SUB-SECT. (vii).—*The Order for Discharge from Custody.*

Order for discharge.

Upon compliance with the judgment for disobedience to which he is committed, the party may move for an order for his discharge from custody. An order is necessary in every case where the period of imprisonment has not run out by effluxion of time (*c*); but where the writ has upon it the note that imprisonment is not authorized for a longer period than one year, no order is necessary as soon as the year expires (*d*).

Imprisonment for contempt in non-payment of costs.

By reason of the Debtors Act, 1869, a person cannot be imprisoned, nor kept in prison for a contempt, in dis-

(*z*) Where a person in prison under a *capias* wished to be present at the trial of an information laid against him. *Attorney-General* v. *Fadden*, 1 Price, 403. A solicitor attached for contempt, in order for him to attend taxation of a bill of costs. *Walsh* v. *Wilson*, 2 Ir. Ch. R. 79.

(*a*) Where an appeal or a writ of error lies, a *habeas corpus* will not be granted. *In re Dunn*, 5 C. B. 215.

(*b*) In cases where the writ is applied for on the ground that the imprisonment is *ultra* the jurisdiction of an inferior Court, the application would properly be made to the Queen's Bench Division. Sect. 34, Judicature Act, 1873.

(*c*) *Green* v. *Thompson*, 1 S. & S. 121.

(*d*) *In re Edwards*, *Brooke* v. *Edwards*, 21 Ch. D. 230. Though an order is still necessary where the writ has not the note upon it. *Nalty* v. *Aylett*, 43 L. J. Ch. 721; *In re Byrne*, 6 L. R. Ir. 455; *Greaves* v. *Keene*, 4 Ex. D. 73. For forms of notice of motion and orders, see Appendix, *infra*, Nos. 80—82.

obedience to an order for non-payment of costs (*e*). The payment of costs may, however, be made a condition precedent to his discharge, where he has been attached for contempt and comes to the Court praying to be discharged (*f*). And although a party cannot now be attached for a contempt in non-payment of costs, he may be committed therefor, after order duly made, under sect. 5 of the Debtors Act, 1869 (*g*).

Sub-sect. (viii).—*Poundage.*

Poundage.

The sheriff is not entitled to poundage upon money paid under a writ of attachment executed by him. It is not clear that the stat. 28 Eliz. c. 4 excludes his right in this case, but it has been the universal practice since that statute not to levy or charge poundage (*h*).

(*e*) *Jackson* v. *Mawby*, 1 Ch. D. 86. It has nothing to do with this that the order under which writ issued was in respect of money payable within exceptions to sect. 4.

(*f*) *In re M.*, 46 L. J. Ch. 24.

(*g*) *Hewitson* v. *Sherwin*, L. R. 10 Eq. 53.

(*h*) *Rex* v. *Palmer*, 2 East, 411; *Rex* v. *Sheriff of Devon*, 3 Dowl. 10.

CHAPTER III.

COMMITTAL.

Attachment.

WHERE the jurisdiction of the Court is invoked for the purpose of compelling the performance of an act, we have seen that the appropriate process is a writ of attachment. By attaching the person to answer for his contempt, opportunity is given him, and he is constrained to perform the duty required. The writ of attachment is, therefore, in many cases, a true process of execution.

Committal.

Where, however, there has been a breach of a judgment or order, and the evil of disobedience has taken place, it is clear that the jurisdiction in contempt is exerciseable for the purpose only of punishment. The fact that the contemnor may by means of that punishment be induced to make reparation, is a collateral result, and not, in truth, execution of the judgment or order at all. It is not possible to lay down any definite rule in order to ascertain when a writ of attachment is the only process available, and when an order for committal should be obtained, for there is no limit to the power of the Court to employ either the one or the other remedy in any given case (*a*). There would appear, however, to be some ground for the distinction that attachment is more properly used when it is sought to enforce the performance of an act, but committal, when mere punishment is intended (*b*), whether for breach

(*a*) See *Piper* v. *Piper*, W. N. 1876, 202, where on motion for order to commit, order to issue writ of attachment was granted. See, as to the reason alleged in the case, *Buist* v. *Bridge*, 29 W. R. 117.

(*b*) But see *Harvey* v. *Morris*, 23 W. R. 21, 40, which was an order for *committal* for disobedience to an order to deposit securities.

of an injunction or undertaking given in Court (*c*). But although the line cannot be distinctly drawn, there are no doubt a number of cases where, by the practice of the Court, committal is usually and most conveniently employed.

O. XLII. r. 7.

By O. XLII. r. 7, a judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment or by committal. This rule fully recognizes what we have just stated as to the power of the Court, and apparently places the two processes on the same footing. The rule would appear to justify the opinion of the late Master of the Rolls, that the distinction between them, that is to say, in respect of the occasion when either the one or the other is available, is practically abolished (*d*). The practice in the two cases is still substantially different, and we shall endeavour to show in what respects. We may premise, that where on a motion for a writ of attachment the Court is of opinion that the proper motion would be for an order of committal, all parties being before the Court, there is power to amend (*e*).

Attachment and committal on same footing.

Committal may be said to be a proper remedy in three classes of cases, which we shall take as the natural subdivision of this Chapter:—

Sect. 1.—Where committal is sought by a litigating party asking for relief;

2.—Where the jurisdiction by way of committal is exercised in cases of what are known as special contempts; and

3.—Where committal is employed as punishment for not paying money within the powers given by sect. 5 of the Debtors Act, 1869.

(*c*) 1 Seton, 297.

(*d*) *Harvey* v. *Harvey*, 26 Ch. D. p. 654, where Mr. Justice Chitty considered the matter. See *Callow* v. *Young*, 56 L. J. Ch. 690.

(*e*) *Callow* v. *Young*, 56 L. J. Ch. 690. See *Buist* v. *Bridge*, 29 W. R. 117.

Sect. 1.—Committal as a Method of Relief to Litigants.

Committal as a remedy for disobedience.

Where a person is restrained by judgment or order from doing some act, if he commits it he is guilty of a contempt. The party interested in the observance of the duty may apply for the punishment of the disobedient person. This punishment may, of course, be inflicted by writ of attachment; but it is usual practice to move for the contemnor's committal (*f*). There is no Rule of Court which prescribes the method of making this application, for the rule which provides that applications shall be by motion only extends to those expressly authorized by the Rules of Court (*g*); but there is no doubt that the proper course is to move. The rules with respect to motions generally apply. At the same time it must be remembered that the Court has ample power, in a clear case and if justice can thereby be done, to pronounce instant committal on an application, *ex parte*, or at the Court's own instance, without any notice to the contemnor (*h*).

What service of injunction necessary.

In order to found this motion there is no necessity that the injunction, of which disobedience is alleged, should have been personally served on the contemnor; it is quite sufficient if it be shown that he had notice of it; for example, by his being in Court at the time the injunction was made (*i*). And he cannot escape the consequences of contempt by retiring out of Court just when the judgment or order is about to be pronounced (*k*). In short, any kind of notice of the judgment or order, and the terms of it, will render it compulsory and binding on the person against whom it is made (*l*).

(*f*) See *Buist* v. *Bridge*, 29 W. R. 117.

(*g*) O. LII. r. 1.

(*h*) *Ex parte Clarke*, 1 Russ. & My. 563.

(*i*) *Skip* v. *Harwood*, 3 Atk. 564; *Anon.*, 3 Atk. 567; *United Telephone Co.* v. *Dale*, 25 Ch. D. 778; *Rider* v. *Kidder*, 12 Ves. 202; *De Manneville* v. *De Manneville*, 12 Ves. 203; *Heywood* v. *Wait*, 18 W. R. 205.

(*k*) *Hearn* v. *Tennant*, 14 Ves. 136.

(*l*) *E. g.*, by telegram; *Re*

It is not necessary for contempt to be possible that the order should have been drawn up or sealed, but it will suffice if it has been simply pronounced (*m*). At the same time, the order should be, where it is practicable, drawn up and served in order for the motion to be well founded.

Order need not have been drawn up.

To proceed to the motion itself. It should be made on an ordinary motion or seal day (*n*), but there is nothing to prevent the Court exercising its jurisdiction at any time.

The motion to commit.

The practice laid down by Lord Eldon to be followed in these cases is still applicable:—"It is not the practice in this Court for a man to show cause why he should not stand committed. The motion ought to be that he shall stand committed for breach of the injunction, and it ought to be made upon personal service upon him that the Court will be moved for that purpose. Where an injunction, the course is to move for an order that he shall do it by a particular day or stand committed" (*o*).

Personal service of notice of motion.

It will be seen from this that the notice of motion must be served personally The general principle has been thus laid down:—"In all cases in law and equity, with only one exception, to bring a person into contempt, the service must be personal; the excepted case in equity is of a subpœna to answer" (*p*).

Substituted service of notice of motion.

Personal service of the notice of motion has been held to be so essential that orders for substituted service were stated to have been made *per incuriam* and discharged (*q*). The wide terms of O. LXVII. r. 6 (*r*), permitting substituted service of any notice, would, however, appear to apply as well to notices of motion to commit as to other

O. LXVII. r. 6.

Bryant, 4 Ch. D. 98, or by verbal notice; *Vansandau* v. *Rose*, 2 Jac. & W. 264. See *Woodward* v. *Earl of Lincoln*, 3 Swanst. 626; *Heywood* v. *Wait*, 18 W. R. 205; *Kimpton* v. *Eve*, 2 V. & B. p. 351.

(*m*) *James* v. *Downes*, 18 Ves. 522.

(*n*) *Saxby* v. *Saxby*, 7 Sim. 140; 2 Dan. Ch. Pr. 6th ed. 1624, n. (*a*).

(*o*) *Angerstein* v. *Hunt*, 6 Ves. 488.

(*p*) *Mullens* v. *Williamson*, 2 Moll. 380. See also *Ellerton* v. *Thirsk*, 1 Jac. & W. 376.

(*q*) *Hope* v. *Carnegie*, L. R. 7 Eq. 254.

(*r*) *Vide supra*, p. 238.

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notices, pleadings, and the like. Clearly, and apart from this rule, however, in a proper case, substituted service may be ordered (*s*), specially where, as it has been expressed, part of the fraud consists in keeping out of the way to avoid service (*t*).

Affidavit of service.

The motion is heard on the merits, the only formal evidence required being, in case the respondent to the motion does not appear, an affidavit of service of the judgment or order, where practicable, and of the notice of motion in every case. Care must be taken to set forth, in the affidavits in support of the motion, precisely the acts complained of (*u*).

Sect 2.—Special Contempts.

Special contempts (*x*).

A contempt of Court may be committed otherwise than by disobedience of a judgment or order the Court has pronounced. Disrespect shown in the face of the Court is such a contempt, and is punishable at once by a summary order. It is not so much to the particular interest of the litigants before the Court that this species of contempt should be punished. It is, therefore, here that the Court takes the initiative, though it is quite within the power, if not the province, of a suitor to call attention to a contempt of this nature (*y*).

Disrespect in face of the Court.

Special contempts in which parties are interested directly.

There are many special contempts which the litigants have a clear interest in punishing. Examples are of every-day occurrence :—interference, by marriage or otherwise, with a ward of Court; interference with a receiver or other

(*s*) *Pulteney* v. *Shelton*, 5 Ves. 147; *Francis* v. *Bailey*, W. N. 1869, 142.

(*t*) *Pearce* v. *Crutchfield*, 14 Ves. 206.

(*u*) *Morris* v. *Morris*, 1 Hog. 238.

(*x*) Seton, 1587.

(*y*) For instances where the Court has taken the initiative, *Mr. Lechmere Charlton's case*, 2 My. & Cr. 333 (where the procedure and forms of orders are fully set out), and *Martin's case*, 2 R. & My. 674.

officer of the Court; publishing accounts of witnesses or suitors, which reflect upon their behaviour or conduct in giving evidence, and the like (*z*). In these cases the process is the same as that in use for committal for breach of an injunction, which we have already discussed. The motion is made against the offending person on notice being served personally upon him (*a*).

Sect. 3.—The Order for Committal and its Effect.

The order for committal for injunctions and special contempts.

As will immediately appear, the process for committal under the Debtors Act, 1869, is regulated by different rules from those which we have in this Chapter hitherto discussed. Postponing, therefore, the consideration of that particular process, we may state that in all cases of committal it is ordered that the person offending "do stand committed to (Holloway) prison for his said contempt." In cases of contempt by breach of an injunction, an order for actual committal is not generally pressed for or directed, the more usual order being for the respondent to pay the costs of the application, though not committed (*b*). It would serve, after all, but little good purpose to imprison a man, *ex post facto*, for breach of a duty due to another; such a proceeding, as has been pointed out, is not execution strictly so called.

Recital of adjudication.

It should appear by the order of committal precisely what the act of contempt is, and the adjudication of the Court thereon, otherwise the order is technically informal, as it does not sufficiently justify an imprisonment under it (*c*). The adjudication is sufficiently recited, however, if it appear from the recital of another order where it was in fact found (*d*). There is authority for the statement, that the

(*z*) Seton, 1587.

(*a*) For forms of notice of motion and order to commit, see Appendix, *infra*, Forms, Nos. 83, 84.

(*b*) Seton, p. 1588.

(*c*) *Ex parte Van Sandau*, 1 Phil. 445, 605.

(*d*) *Cobbett's case*, 7 Q. B. 187.

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order of committal is irregular and can be discharged if it is deficient in not stating the affidavit of service of the order, the notice of motion to commit, or the fact that the defendant had appeared on the motion (*e*).

Motion to discharge order for committal.

Where the order has been obtained irregularly, or is on its face informal in respect of any of the matters which we have just referred to, a motion may be made to discharge it, just as in the case of an informal or irregular order for the issue of a writ of attachment.

Contemnor imprisoned under authority of the order.

The contemnor may be detained in prison by the authority of the order of committal alone, if it is good (*f*). No warrant or writ under the order is necessary, that is to say, he has no right to his discharge on the ground of the absence of either document. The return, therefore, to a *habeas corpus* that the prisoner remained in custody under an order (fully recited) of a Court of competent jurisdiction, without setting out any warrant in the return, was held to be good, and the prisoner not entitled to his discharge (*g*).

The tipstaff.

The usual practice is, however, for a warrant to be prepared under the order, and directed to the tipstaff of the Court (*h*). The tipstaff is an official appointed under sect. 10 of 25 & 26 Vict. c. 104 (*i*). Under sect. 77, Jud. Act, 1873, he is transferred to and has become an officer of the Supreme Court (*k*). The new regulations as to the officers of the Supreme Court, made under sect. 20 of Supreme Court of Jud. Act, 1881 (*l*), do not provide for the appointment of tipstaffs. It is presumed, however, as the present holders

(*e*) *Stephens* v. *Workman*, 11 W. R. 503.

(*f*) See *Ex parte Whitehurch*, 1 Atk. 55.

(*g*) *In the matter of Clarke*, 2 Q. B. 619; *Carus Wilson's case*, 7 Q. B. 984, p. 1016.

(*h*) For form of warrant, see Appendix, *infra*, No. 85.

(*i*) As to the appointment of four of the tipstaffs, formerly, see Tidd's Pr. pp. 53, 54, 59, and reference to Report of H. L. 1798.

(*k*) There were formerly seven tipstaffs. Their pay and duties are specified in the 2nd Rep. Legal Dep. Comm. 1874, p. 20. The report recommends that their duties should, in the future, be performed by the senior usher, which recommendation has not altogether been carried out, as appears in the text.

(*l*) 44 & 45 Vict. c. 68.

of the office cease to perform their duties, by retirement or otherwise, the number of tipstaffs will be decreased, and the office then given to some well-recognizable official in the Royal Courts.

The warrant of commitment.

The tipstaff's justification and authority is contained in the warrant usually made out and addressed to him, just as the writ is the justification and authority of the sheriff. It must, therefore, set forth sufficient to justify the imprisonment. It is sufficient to recite the adjudication of a competent Court, without setting forth the facts in which the contempt consisted (*m*). But where it recites an order which is clearly informal and bad, the warrant will be no justification (*n*). Again, it should state the Court or judge who made the order (*o*). The warrant being for the protection of the tipstaff is procured by him (*p*).

Sect. 4.—The Difference between Committal and Attachment.

Difference between committal and attachment.

We are now able to ascertain with greater clearness such distinction as remains between the effect of a writ of attachment and the effect of committal.

Committal proper remedy for breach of undertaking.

In a recent case a motion was made for leave to issue a writ of attachment on breach of an undertaking. The objection was taken that an order for committal was the proper remedy in such a case. Mr. Justice Chitty decided that the objection was well founded, but gave leave to amend the notice of motion by asking, in the alternative, for committal (*q*). It is suggested that, notwithstanding this decision, but little real substantial distinction between the effect of the two processes subsists.

Attachment, sheriff.

In the first place, the writ of attachment is directed to the sheriff; the order of committal is carried out by the

(*m*) *Ex parte Fernandez*, 10 C. B. N. S. 3.

(*n*) *Green* v. *Elgie*, 5 Q. B. 99.

(*o*) *Van Sandau* v. *Turner*, 6 Q. B. 773.

(*p*) A form is given in the Appendix, *infra*, p. 433, Form No. 85.

(*q*) *Callow* v. *Young*, 56 L. T. 147.

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Committal, tipstaff.

tipstaff. But the consequences to the contemnor are the same, and the same proceedings are necessary to obtain his discharge.

Difference in service of notice of motion.

Where a motion is made for leave to issue a writ of attachment, personal service of the notice is not necessary, but personal service of the order is, for disobedience of which it is sought to issue the attachment. In the case of a motion to commit, personal service of the injunction or order is not necessary, but personal service of the notice of motion is. This appears to be the greatest practical difference now existing.

Attachment bailable, committal not.

Leaving questions of mere practice, there are, or have been, other differences. We have already seen that on a writ of attachment the sheriff may take bail. Where a person is committed into the custody of the tipstaff that officer has no such power (*r*).

Attachment against parties; committal against other persons.

We have seen in the preceding Chapter, as to the nature of a contempt, that, as against parties to a suit in equity, the enforcement of the decree was a matter of right in the persons interested, who could therefore proceed by way of process for contempt as the means of execution. In these cases the writ of attachment, issued at the risk of the person suing it out, was the appropriate remedy. Where, however, relief was claimed by a party against other parties not present in Court, or against other persons, whether officers of the Court or not, who were not parties to the cause, the pertinent remedy was by order of committal (*s*). This practice was varied by C. O. XXIX. r. 3, giving power to parties to issue writs of attachment against any person, but this rule was, again, abrogated by r. 2, made under the Debtors Act, 1869 (*t*). To keep in strict accord with the ancient practice of the Court of Chancery,

(*r*) *Buist* v. *Bridge*, 29 W. R. 117.

(*s*) *Re O'Reillys*, 2 Hog. 20; *Lansdown* v. *Elderton*, 14 Ves. 512; *Re Bell's Estate*, *Foster* v. *Bell*, L. R. 9 Eq. 172.

(*t*) Since the order for commitment was made against persons not parties, it followed that they should be heard not upon motion in the cause, but upon petition. *Nicholson* v. *Squire*, 16 Ves. 260.

it is clear that, in analogous cases to those last instanced, the procedure for enforcement of an order should be by order of committal and warrant thereon. Since, however, the provisions of O. XLIV. r. 2, render it imperative that the leave of the Court should always be obtained before a writ of attachment can be issued, there seems to be no reason for the contention that any substantial difference between attachment and committal, on the ground that the latter is more properly applicable against persons who are not parties, still subsists.

Difference in the right to *habeas corp. ad subj.*

Formerly, there would appear to have been a difference between the effect of attachment and committal where it was desired to apply for a *habeas corpus ad subjiciendum*. When a person has been committed by a Court of competent jurisdiction, a writ of *habeas corpus*, unless the order of committal is bad on its face (*u*), will not be granted. The contemnor has been found guilty of a contempt, and if he desires to call into question the justice of the sentence, he must raise the question by appeal from the judgment or order, and not on the return to a *habeas corpus*. This has always been established practice. When, however, writs of attachment were issuable as of right and without leave, it might well happen that the writ was issued improperly and illegally. It will be observed that the writ contains no recital of the judgment or order on which it is founded, and, therefore, on proper evidence being given of illegal custody, there is no doubt, on principle, that the injured person might have had his writ of *habeas corpus*. Now, however, no attachment is issued without an adjudication that the contemnor is in contempt, and this distinction between the two processes has disappeared.

No writ on order for committal.

Formerly the writ might perhaps be granted after attachment.

The state of things formerly existent was exemplified by the older practice in Chancery. Where a person was in custody for contempt, he must have come to the Court committing him by petition, but where he was in custody

(*u*) As in *Green* v. *Elgie*, 5 Q. B. 773.

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under a writ of attachment, he might have applied to set the writ aside in the Court issuing it, or, where that writ was illegally issued, for a *habeas corpus*.

Sect. 5.—Committal under Debtors Act, 1869, s. 5.

Power of committal under Debtors Act, 1869.

We have seen (*x*) that sect. 4 of the Debtors Act, 1869, abolished imprisonment for non-payment of money in all but certain excepted cases. Sect. 5 of the Act, however, endowed the Court with an entirely new power of committal. That section enacts in substance as follows:—That subject to the provisions hereinafter mentioned, and to the prescribed rules, any Court may commit to prison, for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt, or instalment of any debt, due from him in pursuance of any order or judgment of that or any other competent Court, and further provides the restrictions under which such power shall be exercised. A comparison of this section with sect. 4 will show that committal under it is in the nature of a discretionary committal for contempt.

Transfer of jurisdiction to bankruptcy.

The jurisdiction thus given is now assigned to and exercised by the judge of the High Court to whom bankruptcy business is assigned (*y*); and this further power given to him, that—"Where, under sect. 5 of the Debtors Act, 1869, application is made by a judgment creditor to a Court having bankruptcy jurisdiction for the committal of a judgment debtor, the Court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor, and on payment by him of the prescribed fee, make a receiving order against the debtor. In such

(*x*) *Supra*, p. 218.

(*y*) 46 & 47 Vict. c. 52 (Bankruptcy Act, 1883), s. 103 (i.), and Lord Chancellor's Orders, 1st Jan. 1884, 4th March, 1885.

case the debtor shall be deemed to have committed an act of bankruptcy at the time the order is made" (*z*).

The rules regulating the practice under this section are General Rules in Bankruptcy (*a*), Rules 355—362. The mode of proceeding is by a summons, leave to issue which must be obtained from the judge in bankruptcy (*b*).

The practice under this sect. 5 is sufficiently discussed in books of Bankruptcy Practice (*b*), and calls, therefore, for little comment here. It should be stated, however, to show the extent of jurisdiction assumed by the Courts in this particular, that the words "debt or instalment of any debt" have received a judicial construction. The phrase does not mean that a sum must have been recovered under a judgment by A. from B. (*c*). Any order to pay a sum or sums of money appears to be within the section (*d*). The Court can order the committal of a debtor who is such within the terms of the section, notwithstanding that the liability is not proveable in bankruptcy, and that there is no jurisdiction to adjudicate him a bankrupt in respect thereof (*e*).

Debt or instalment of any debt.

The section gives power to commit persons under a disability when judgment is once signed against them; for example, a married woman (*f*).

Persons under disability.

It is a question whether sect. 103, above mentioned, has taken away from the ordinary judges the power and jurisdiction given them by sect. 5 of the Debtors Act (*g*).

(*z*) Sect. 103 (5).

(*a*) Dated 22nd Sept. 1886.

(*b*) Rule 356. See Yate-Lee & Wace on Bankruptcy for the practice generally.

(*c*) *Hewitson* v. *Sherwin*, L. R. 10 Eq. 53, where an order to pay costs was held to be within the section.

(*d*) An order to pay alimony. *Linton* v. *Linton*, 15 Q. B. D. 239.

(*e*) *Ex parte Fryer, Re Fryer*, 17 Q. B. D. 718, where it is shown that the jurisdiction to adjudicate in bankruptcy under sect. 103, above mentioned, is not co-extensive with the jurisdiction to commit.

(*f*) *Dillon* v. *Cunningham*, L. R. 8 Ex. 23.

(*g*) *Genese* v. *Lascelles*, 13 Q. B. D. 901.

CHAPTER IV.

THE WRIT OF SEQUESTRATION.

SECT. 1.—THE NATURE OF THE WRIT.

Nature of the writ.

THE third and last process of execution available against persons in contempt is the writ of sequestration. The nature of this writ is thus described in a leading text book: "The process of sequestration is a writ directed to certain persons, nominated by the person prosecuting the judgment or order, empowering them to enter upon the real estate of the disobedient person, and to receive, sequestrate, and take the rents and profits thereof, and also his personal estate, and keep the same under sequestration in their hands until he shall have performed the act required and cleared his contempt" (*a*).

Stringency of this execution.

This is the most stringent process of execution against property known to or issued by the Courts. It is a proceeding put in motion in order to attach whatever property the contemnor has into the custody of officers appointed by the Courts for the purpose (*b*). The only process of execution which it somewhat resembles is the appointment of a receiver, considered in a subsequent Chapter (*c*).

(*a*) Dan. Ch. Pr. 912. It would be more correct to say, "until further order of the Court." *Vide* form of writ, *infra*, and *Wharam* v. *Broughton*, 1 Ves. sen. 181.

(*b*) See *Wharam* v. *Broughton*, 1 Ves. sen. 181. From the point of view of the person who sets the process of sequestration in motion, it is "neither in form nor in substance an execution." The proceeds are simply *in custodia legis*, to abide the order of the Court. *Burne* v. *Robinson*, 7 Ir. Eq. R. 188. But *quoad* the landlord, it is an execution. *Dixon* v. *Smith*, 1 Swans. 457.

(*c*) The most important differ-

The essence of the writ of sequestration is that it is issued in order to constrain a person who is in contempt (*d*). Where, as in most cases, the contempt consists in the non-payment of money, the Court has, as will be seen, assumed a jurisdiction to apply the property in the hands of the sequestrators to the satisfaction, in whole or in part, of the amount due (*e*). This is not done under or in reality by virtue of the writ itself, but by further order of the Court.

Distringas and *capias utlagatum.*

There were two processes at law which bore some resemblance to the writ of sequestration (*f*), viz., the writ of *distringas* (*g*), and the writ of *capias utlagatum cum breve de inquirendo* (*h*). The consideration of these two writs does not come within the purview of this work.

The writ was first introduced or invented in Sir Nicholas Bacon's time (*i*). It is, therefore, of comparatively modern origin (*k*).

ences between the office of receiver and that of sequestrators are, first, the greater immunity the last-mentioned persons have; and, secondly, a receiver is appointed in respect of certain property named in the order, whereas sequestrators have no limitation placed upon them as to the property of which they may take possession. Sequestrators and receivers compared in some points, *Angel* v. *Smith*, 9 Ves. 335.

(*d*) Contempt of all decrees in Chancery. *Beddingfield* v. *Zouch*, Freem. Ch. R. 168.

(*e*) See the remark of Jessel, M. R., as to the meaning of the word "sequestration" in sect. 163, Companies Act, 1862, *In re Australian Direct Steamship Navigation Co.*, L. R. 20 Eq. 325.

(*f*) The writ must not be confused, it is almost unnecessary to say, with *sequestrari de bonis ecclesiasticis*. See *Ward* v. *Hayes*, 1 Hog. 107.

(*g*) 1 Ves. sen. p. 183.

(*h*) See Form ciii. to Corner's Crown Practice, and note to 4 Ves. p. 738.

(*i*) See Hinde, Ch. Pr. 128; 1 Vern. 421; *Hide* v. *Pettit*, 1 Ch. Ca. 91. "Sequestrations were not heard of till the Lord Coventry's time, when Sir John Read lay in the Fleet (with 10,000*l.* in an iron cash chest in his chamber) for disobedience to a decree, and would not submit and pay the duty. This being represented to the Lord Keeper as a great contempt and affront put upon the Court, he authorized men to go and break up

(*k*) See note (*k*), *infra*.

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Lies only where there is contempt.

The primary purpose of the writ being, as we have seen, to enforce obedience in cases of contempt (*l*), it is not applicable to enforce a mere judgment or order for recovery of land or money where no contempt has been committed (*m*). This elementary proposition of law was overlooked in a recent case until it came before the Court of Appeal, where the expressions of opinion of the Lords Justices sufficiently show their astonishment at the writ having been issued at all in respect of a simple judgment for money (*n*).

Form of writ of sequestration.

The prescribed form of the writ of sequestration is as follows (*o*) :—

Victoria by the grace of God, &c.

To [*names of not less than four commissioners*] greeting:

Whereas lately in the Division of our High Court of Justice, in a certain action there depending, wherein A. B. is plaintiff and C. D. and others are defendants [*or*, in a certain matter then depending, intituled "In the matter of E. F.," *as the case may be*] by a judgment [*or*

his iron chest, and pay the duty and costs, and leave the rest to him, and discharged his commitment. From thence came sequestrations." North's Life of Guilford, ed. 1826, i. p. 420.

(*k*) The writ provoked great hostility in the Courts of common law. It was even said that sequestrators were illegal, and that to kill a sequestrator was no murder. These are characterized as "bloody and desperate resolutions." Gilb. For. Rom. 78. See also 3 Swanst. 280; *ibid.* 308, whence it appears that the power of the Court of Chancery to sequester was questioned in the House of Lords, date 1670. But see *Beddingfield* v. *Zouch*, Freem. Ch. R. 168.

(*l*) It has been said, with reference to the construction of a particular statute, that sequestration is not a part of the process for contempt. *Tatham* v. *Parker*, 1 Sm. & G. 506, V.-C. Parker. The process of sequestration was never confined, however, to execution of decrees for non-payment of money. *Beddingfield* v. *Zouch*, Freem. Ch. R. 168; *Lupton* v. *Hescott*, 1 S. & S. 274; *Re Hassenclever*, 1 Bro. C. C. 434.

(*m*) 3 Bl. Comm. ed. 1876, 419.

(*n*) *Ex parte Nelson*, *Re Hoare*, 14 Ch. D. 41. See *Willcock* v. *Terrell*, 3 Ex. D. 323.

(*o*) O. XLII. r. 14, Appendix H. No. 13. See Appendix, *infra*, p. 434, Form No. 87.

order, *as the case may be*] of our said Court made in the said action [*or* matter], and bearing date the day of 18 , it was ordered that the said C. D. should [pay into Court, to the credit of the said action, the sum of £ , *or as the case may be*].

Know ye, therefore, that we, in confidence of your prudence and fidelity, have given, and by these presents do give, to you, or any three or two of you, full power and authority to enter upon all the messuages, lands, tenements, and real estate whatsoever of the said C. D., and to collect, receive, and sequester into your hands not only all the rents and profits of his said messuages, lands, tenements, and real estate, but also all his goods, chattels, and personal estates whatsoever; and, therefore, we command you, any three or two of you, that you do, at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements, and real estate of the said C. D., and that you do collect, take, and get into your hands not only the rents and profits of his said real estate, but also all his goods, chattels, and personal estate, and detain and keep the same under sequestration in your hands until the said C. D. shall [pay into Court, to the credit of the said action, the sum of £ , *or as the case may be*] clear his contempt, and our said Court make other order to the contrary.

Witness, &c. (*p*).

(*p*) It should be noted that there is no direction to return this writ. See *Goldsmith* v. *Goldsmith*, 5 Hare, 123; *Rawlinson* v. *Stringer*, 1867, R. No. 100, *vide* Dan. Ch. Pr.

Sect. 2.—Practice on Issue of Writ and on Applications consequent thereon.

Formerly issuable in last resort only.

Formerly, this writ only issued by order of the Court, and where the person against whom the decree or order had been made had stood or "sat" out all other process of contempt, or could not be found (*q*). By sect. 8 of the Debtors Act, 1869 (*r*), however, sequestration against the property of a debtor may, after the commencement of the Act, be issued by any Court of equity in the same manner as if such debtor had been actually arrested (*s*).

When issuable.

The writ is issuable in certain cases under and by virtue of the rules of court. It is, of course, still available in other cases of gross contempt, and then the leave of the Court must be obtained, due cause being shown on motion before it can be issued. What we have already stated with reference to the motion for leave to issue writ of attachment, the service of notice thereof, and the like, will apply equally to motion for leave to issue sequestration (*t*).

Notice of motion for leave to issue sequestration.

The provisions, however, of O. LII. r. 4, do not apply to the notice of motion for leave to issue a writ of sequestration as they do to the notice of motion for writ of attachment. It is not necessary, therefore, that the notice should set forth the grounds on which the sequestration is about to be applied for (*u*). It seems to be the better practice, unless in an important or complicated case, to apply for leave to issue on a summons in chambers, and not on motion (*x*).

(*q*) See Beames' Ch. Ord. p. 15; Gilb. For. Rom. 79; *Wenman* v. *Osbaldiston*, 2 Bro. P. C. 276.

(*r*) 32 & 33 Vict. c. 62.

(*s*) *Sykes* v. *Dyson*, L. R. 9 Eq. 228. As to what jurisdiction was conferred by the statute, see *Hodgson* v. *Hodgson*, 23 Beav. 604; *Miller* v. *Miller*, L. R. 2 P. & M. 54.

(*t*) Forms of notice of motion, Appendix, *infra*, Nos. 88, 89. *Query*, whether in all cases the notice should be served. *Monk* v. *Lawlor*, 1 Jones, 554.

(*u*) *Selous* v. *Croydon Rural Sanitary Authority*, 53 L. T. N. S. 209.

(*x*) *Snow* v. *Bolton*, 17 Ch. D. 433; *Selous* v. *Croydon Rural Sanitary Authority*, 53 L. T. N. S. 209.

The rules relating to sequestration are as follows: By O. XLII. r. 4, "A judgment for payment of money into Court may be enforced by writ of sequestration, or, in cases in which attachment is authorized by law, by attachment."

O. XLII. r. 4. Payment into Court.

By r. 6, "A judgment for the recovery of any property other than land or money may be enforced:

O. XLII. r. 6. Recovery of property other than land or money.

(a) By writ for delivery of the property;

(b) By writ of attachment;

(c) By writ of sequestration."

By r. 8, the writ of sequestration is included in the term "writ of execution," and therefore the rules of O. XLII. which apply to writs of execution generally, apply here.

O. XLII. r. 8. Sequestration a writ of execution.

By r. 31, "Any judgment or order against a corporation wilfully disobeyed may, by leave of the Court or a Judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property."

O. XLII. r. 31. Order against a corporation.

By O. XLIII. r. 6, "Where any person is by any judgment or order directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment or order refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment or order shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person. Such writ of sequestration shall have the same effect as a writ of sequestration in Chancery had before the commencement of the principal Act, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration were before the same date dealt with by the Court of Chancery."

O. XLIII. r. 6. Payment into Court.

This rule seems to incorporate, if not to abrogate, r. 3 of the General Order under the Debtors Act, 1869 (*y*), which

General Order under Debtors Act as to

(*y*) Gen. Ord. dated 7th Jan. 1870.

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sequestration for costs.

enacted that—"Where any person is by a decree or order made in any suit or matter directed to pay money or costs in a limited time, and after due service of such decree or order refuses or neglects to make such payment according to the exigency of such decree or order, the person prosecuting such decree or order shall, at the expiration of the time limited for such payment, be entitled to a commission of sequestration, which may be issued by the clerks of records and writs without any special order, upon production of evidence to the same effect as that which would heretofore have been required on issuing a writ of attachment for default in making such payment."

O. XLIII. r. 7. No *subpœna* for costs.

By r. 7 of O. XLIII., no subpœna for the payment of costs, and, unless by leave of the court or a judge, no sequestration to enforce such payment, shall be issued (*z*).

Sequestration for costs.

In a proper case the court will give leave; for instance, where a *fi. fa.* would have been productive of no useful result, and the person against whom the order for costs was made was an officer living on a pension, having apparently no other means, leave was granted (*a*).

Sequestration execution, and not punitive.

While proceeding to discuss these and the other general rules relating to sequestration, we must bear in mind the distinction, which has been adverted to in the Chapter on Committal, between the exercise of the power of the Courts for purposes of enforcing a judgment, and for purposes of punishment merely. The process of sequestration is only used for the latter purpose in one case, viz., that of a corporation, under O. XLII. r. 31, *supra*, and, therefore, is not as a rule available if the contemnor has disobeyed an injunction or committed a special contempt.

Simultaneous

Moreover, the writ of sequestration can, in the same way

(*z*) This rule does away with the practice under rules 4 and 5 of the Gen. Ord. under the Debtors Act, 1869, dated 7th Jan. 1870.

(*a*) *Snow* v. *Bolton*, 17 Ch. D. 433. The application should be made by summons in chambers. See also *Selous* v. *Croydon Rural Sanitary Authority*, 53 L. T. N. S. 209, *et supra*.

as other process for contempt, be put in force simultaneously with any other method of execution. No objection will lie to it, or to such other method, that its enforcement is double execution, and therefore wrong (*b*).

sequestration and other execution.

Where a writ of sequestration is resorted to for enforcement of an order for payment of money into Court, or to do any other act in a limited time, we have seen that, by O. XLIII. r. 6, "due service" of that order is expressly made necessary before the writ can issue. The service here referred to is that required by O. XLI. r. 5, viz., personal service. This last-mentioned rule applies in all cases where a writ of sequestration is available to enforce an order to do any act, and every such order must, further, comply with the rule in the matter of indorsement (*c*). Personal service and indorsement form, therefore, a condition precedent to the issue of a writ of sequestration, just as they do to the issue of a writ of attachment—both are process consequent upon contempt.

Indorsement and service of order.

The writ of sequestration, when prepared and issued, should be handed to the sequestrators, with instructions for carrying it into effect (*d*). The sequestrators or commissioners are by the writ constituted officers of the Court, but they are nominated by, and act under, the direction of the person prosecuting the contempt, or of his solicitor (*e*). If they fail in the performance of their duty, it is not a matter for which an action may be brought, but all complaints against them should be made in the matter in which they are appointed, and to the Court appointing them (*e*). The person prosecuting the contempt, or some one on his behalf, gives the instructions as to the execution of the writ, and he,

Practice after issue of writ.

(*b*) *Perryman* v. *Dinham*, 1 Rep. Ch. 52.

(*c*) *Vide supra*, p. 152, subject, of course, to the exceptional case of enforcement of an injunction against a corporation by means of the writ. *Selous* v. *Croydon Local Board*, 53 L. T. N. S. 209.

(*d*) Dan. Ch. Pr. 913.

(*e*) Gilb. For. Rom. 79; Hinde, Ch. Pr. 138.

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Damages.

therefore, is responsible for any damage which the contemnor or a third person may suffer in consequence. An inquiry as to damages may be directed where the third person has been injured, by the sequestrators taking possession of property belonging to him (*f*). It is material to ascertain what the instructions given are, for if the sequestrators have acted illegally, without instructions, or have abused their power, they may be attached (*g*).

Sect. 3.—Duties of the Sequestrators.

Duties of the sequestrators.

The first duty of sequestrators is to take possession, or, as it is expressed in the writ, to "go and enter upon all the messuages, &c.," and to "collect, take, and get into their hands," the rents and personal estate. The writ itself authorizes nothing more than the mere taking possession, any disposition whatever of the proceeds of the execution must form the subject of a further order of the Court (*h*). If, when the sequestrators endeavour to take possession, the contemnor refuses to be ousted, it is doubtful how far they can use force (*i*). Any interference with them is a contempt, and in this case, as in others, their proper course is to move for a writ of attachment. This writ being directed to the sheriff, there are abundant means of enforcing it, and when the contemnor is by this means removed the sequestrators can proceed. They have no power to interfere themselves with the person of the contemnor (*k*).

(*f*) See *Copeland* v. *Mape*, 2 Ba. & Be. 66.

(*g*) As in *Pelham* v. *Harley*, 3 Swanst. 291.

(*h*) It is important to remember that the form of the writ is itself variable, and when issued under an order the writ may be to a great extent a recital of it. Dan. Ch. Pr. 912.

(*i*) *Lowten* v. *Mayor of Colchester*, 2 Mer. 395. They can use force where specially authorized by order of the Court. *Pelham* v. *Duchess of Newcastle* (No. 3), 3 Swans. 290.

(*k*) This has been expressed in

When the sequestrators have obtained possession, interference with them is, again, a contempt (*l*). Where such interference or disturbance takes place, the practice is to attach those directly concerned and to grant an injunction to restore the sequestrators to possession (*m*). It seems to have been the practice frequently to take an injunction in aid of the writ of sequestration (*n*). If a breach of this injunction were committed, as well as contempt by interference with the sequestrators, a writ of assistance issued (*o*).

Interference a contempt.

Sect. 4.—Effect of Sequestration on Rights of Third Person.

Sub-sect. (i).—*Applications of Third Parties* pro interesse suo.

With regard to persons other than the contemnor, the writ of sequestration is a most high-handed proceeding. It would appear that no one can, even in the defence of his own, interfere with the sequestrator without committing a contempt (*p*). Proceedings for attachment can, therefore, be taken at once; though there is no doubt that, except in a flagrant case, the Court would be inclined to deal leniently with the owner of property who endeavoured to insist on his undoubted rights. The extraordinary

Effect of writ on rights of third persons.

another manner, when it was said that a sequestration is a proceeding *in rem*, not *in personam*. *Tatham* v. *Parker*, 1 Sm. & G. 506.

(*l*) *Angel* v. *Smith*, 9 Ves. 335; *Brooks* v. *Greathed*, 1 Jac. & W. 178. Interference with goods liable to sequestration, after it is sued out, is also a contempt. *Harvey* v. *Harvey*, 2 Ch. Ca. 82.

(*m*) *Pelham* v. *Newcastle* (2), 3 Swanst. 289.

(*n*) As in *Pelham* v. *Harley*, 3 Swanst. 291.

(*o*) *Bird* v. *Littlehales*, 3 Swanst. 299. At the present time in such a case, no doubt, the practice would be to obtain an order for possession, and on that issue a writ of possession. That is, if the process of contempt were stood out.

(*p*) An action commenced against a sequestrator in respect of acts done under the writ, will be stayed. *Kaye* v. *Cunningham*, 5 Mad. 416.

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nature of the proceeding was in an early case put pointedly enough: "if a sheriff executed an execution upon goods that did not belong to the defendant, the party grieved might have his action; but in case of sequestration, all the recompense a person could have whose goods were wrongfully sequestered was barely a restitution on proof of his right" (*q*). That is to say, after an injury to a person has been done, the person injured has two remedies—either to endeavour, by interfering with the sequestrator, to get a motion for an attachment to be issued against him, on which he could *perhaps* show cause, or to apply to the Court for liberty to come in and prove his own title, *pro interesse suo*, as it is called (*r*).

Practice on applications *pro interesse suo*.

The practice in these cases was discussed in a judgment of Sir James Wigram, V.-C., date 1844.

The case was, that after sequestrators had taken possession, a third party claiming the land came in, and was examined *pro interesse suo*. The master reported, and on exceptions being taken to the report, the whole question was raised. The important part of the judgment for our purpose is:—"The first question was, whether the Court would try the rights of the parties on this proceeding. Cases of this kind are of rare occurrence; I hesitated much upon this part of the case, never having had occasion to consider the practice before. Upon looking into the authorities collected in Mr. Swanston's report (3 Swanst. 276 *et seq.*), and in Daniell's Chancery Practice (vol. i. p. 646 *et seq.*), and on referring to the cases of *Angel* v. *Smith* (9 Ves. 335), *Brooks* v. *Greathed* (1 Jac. & W. 176), *Johnes* v. *Claughton* (Jac. 573), *Wharam* v. *Broughton* (1

(*q*) *Pelham* v. *Newcastle* (3), 3 Swanst. 290. There is, therefore, no precedent to be found of trespass, or other action at law, maintained for acts which a sequestrator has done in abuse of his power.

(*r*) Forms of notice of motion and orders, Appendix, *infra*, Nos. 90—92. Gilb. For. Rom. 80. Formerly the application could not be made, unless the sequestrators were in possession, and had returned the writ. *Pelham* v. *Newcastle* (2), 3 Swanst. 289, p. 290. The return does not appear now to be necessary, no office will receive it. *Goldsmith* v. *Goldsmith*, 5 Hare, 123, p. 129. And see form of writ, *supra*.

Ves. 180), and *Copeland* v. *Mape* (2 Ba. & Be. 66), it is perfectly clear that the Court exercises a discretion. Where the case has been considered to admit of no doubt, the Court has determined it without a reference to the master. In some cases, the Court has ordered the parties to bring an ejectment: in other cases, where the sequestrator has found a person in possession of the property, the Court has ordered a writ of assistance to issue, unless the party submitted to come in and be examined *pro interesse suo* (*s*). The Court sees what is necessary to be done in order to try the question of right, and it then puts it in the way of trial. If the Court did not thus assert its jurisdiction, a sequestration would be a mere form. I have not the slightest doubt of the jurisdiction to try the question; my only doubt has been on the manner in which it may best be tried, and on what ought to be done in the meantime." The decision was, ultimately, that the question ought to be tried at law, and the form of the order is given (*t*).

Summary of practice.

The practice may therefore be stated thus:—Where a claim of right is made by a person not a party to the proceedings, the matter should be at once brought by the sequestrators before the Court. Whether they are in possession of the subject-matter of the dispute or not, the Court will, on the application of either party, make such order as will meet the circumstances of the case. For the reason, however, that interference by anyone is a contempt, the sequestrators have usually gone or been ordered into possession, and the order, with reference to the right of the claimant, is then made on his motion (*u*). Where, on the hearing of this application, the right of the claimant is

(*s*) There is no doubt of this jurisdiction being exercisable *in invitum* (*Bird* v. *Littlehales*, 3 Swanst. p. 300), though it has been denied: *Kaye* v. *Cunningham*, 5 Mad. 406, where, however, the sequestrator was in possession. See the reason given for compelling parties to come in, *Angel* v. *Smith*, 9 Ves. p. 337; Gilb. For. Rom. 80.

(*t*) *Empringham* v. *Short*, 3 Hare, 461.

(*u*) Or in the Queen's Bench Division by summons in chambers.

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quite clear, the Court will decide summarily (*x*). Where, however, it is not clear, or the matter would take a lengthened investigation, an inquiry will be directed as to the interest of the claimant in the subject-matter of his application (*y*).

Proceedings where sequestrators not in possession.

If the sequestrators are not in possession, the claimant, being in contempt, and in reality asking for the inquiry *pro interesse suo*, would be put under some terms as to the preservation of the property, until such time as the chief clerk's certificate could be completed and order made thereon. The Court would probably order that possession be given up to the sequestrators, or, if the expense of that process is too great, cause such undertaking or security to be given by the claimant as would secure the sequestrators against loss (*z*).

Inquiry before chief clerk.

The inquiry before the chief clerk (*a*) is, under the modern practice, conducted in the same manner as an ordinary inquiry as to title. The sequestrators claim under their writ, and the claimant proves his title. If there is anything in the case calling for a special inquiry, by means of interrogatories or otherwise, or requiring that the inquiry should be taken in any particular manner, care

(*x*) As in *Dixon* v. *Smith*, 1 Swanst. 457, where sequestrators had gone on and sold chattels, notwithstanding a distress put in by the landlord, who was the applicant, and who obtained an order that his rent and costs should be paid out of the fund standing to the credit of the cause. The form of the order is given. See *Empringham* v. *Short*, 3 Hare, 461.

(*y*) Seton, 1583.

(*z*) The practice formerly was, for the claimant to petition or move for leave to come in *pro interesse suo*, and he would only be heard after the sequestrators had taken possession. The order was then made for reference to the master for examination and report. The claimant was ordered to deliver particulars of his claim, upon which the party pursuing the sequestration administered, or, as the phrase was, "exhibited," interrogatories. See *Hamlyn* v. *Lee*, 1 Dick. 94; *Pelham* v. *Newcastle* (No. 2), 3 Swanst. 290. And *Hunt* v. *Priest*, 2 Dick. 540, where the old practice is set forth at length.

(*a*) Or, in the Queen's Bench Division, on a reference by the judge making the order, to a master. For old practice, see *Keene* v. *Price*, 1 S. & S. 98; *Hamlyn* v. *Lee*, 1 Dick. 94.

must be taken to provide for it in the order (*b*). The chief clerk has every control over the inquiry under O. LV. rr. 15, 16, and 17, and the Court will take such steps as are necessary to make it an effective proceeding; for example, will order the claimant to make discovery (*c*).

Order for sequestrator to withdraw.

Where, on the inquiry, the claimant is successful and makes out his title, an order will be made that the sequestrators do withdraw from possession (*d*), or where the circumstances warrant it, that the goods sequestered be specifically restored to the claimant, and a reference taken as to damages (*e*). Where the successful claimant is a mortgagee, since the sequestrators hold the rents and profits *in custodia legis*, the order should further contain a direction that they do account to him. In such a case, the costs of the sequestrators are first provided for out of the rents and profits of the particular estate claimed, and the costs of the mortgagee are added to their security (*f*).

Sequestrators' costs.

Sequestrators' right to redeem.

The sequestrators, after the accounts have been taken, and the sum due to the mortgagee ascertained, have a right to redeem the property (*g*).

Sub-sect. (ii).—*Proceedings by Sequestrators for Recovery and Management of Property subject to the Sequestration.*

Where separate action necessary.

It is not in all cases where third parties are claiming against sequestrators that the proper method of trying the question is on an application *pro interesse suo*. Where, for example, the sequestrators are not in possession, and

(*b*) O. LV. r. 15. This is, of course, of special importance in the Queen's Bench Division, so that the master's duty may clearly appear.

(*c*) *Alton* v. *Harrison*, W. N. (1869), 81.

(*d*) Form No. 92 in Appendix, *infra*.

(*e*) *Copeland* v. *Mape*, 2 Ba. & Be. 66.

(*f*) The leading authority in the case of a mortgagee coming in is *Walker* v. *Bell*, 2 Mad. 21, where the order made will be found set forth.

(*g*) *Fawcet* v. *Fothergill*, 1 Dick. 19; *Hamlyn* v. *Lee*, 3 Swanst. p. 304. To the extent of the sum paid off by him, the party moving the sequestrators would stand in the shoes of the mortgagee.

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specially where they are endeavouring to attach funds due to the person in contempt, it is advisable to commence separate proceedings to enforce the sequestration. For example, where the sequestration was removed by a fraud, and a subsequent mortgagee, having notice thereof, endeavoured to insist on his claim, the plaintiff, at whose instance the sequestrator had been appointed, took proceedings by a separate bill to have the priorities declared (*h*). This suit necessarily involved that the mortgage of the claimant should be declared void as against the sequestration, and, therefore, could not have been properly tried out on mere proceedings *pro interesse suo*.

Reason for the action.

Where the persons in actual possession of the land are tenants of the contemnor, the sequestrators should give notice of their appointment to each tenant, and require him to attorn (*i*). The tenant is not apparently bound to attorn or pay his rent to the sequestrator without an order of the Court or an indemnity (*k*).

Tenants of the contemnor.

An order will be made on notice to the tenants to be affected thereby that they do attorn (*i*); the writ is not of itself such an order. The mere refusal of a tenant to attorn is not, therefore, a contempt until the order has been made against him.

Order to attorn.

It is advisable in all cases to obtain the order, for it was decided at law that the sequestrators could not, even after attornment, recover the rent in an action, there being nothing in the mere appointment of sequestrators and the attornment to put an end to the previously existing tenancy (*l*). It would appear, therefore, that the sequestrators must proceed against the tenant upon the order

Order against tenant to pay.

(*h*) *Ward* v. *Booth*, L. R. 14 Eq. 195.

(*i*) Or pay the rent to the sequestrators. *Rowley* v. *Ridley*, 3 Swanst. 306; *Goldsmith* v. *Goldsmith*, 5 Hare, 123. Forms of proceedings as to tenants, Appendix, *infra*, Nos. 93—97.

(*k*) *White* v. *Wood*, 2 Y. & C. C. C. 615, where the tenant was, on his insisting, allowed his costs of appearance on motion to compel him to pay.

(*l*) *Cornish* v. *Searell*, 8 B. & C. 471. The writ, as has been said, operates in no wise as a conveyance or assignment of the contemnor's estate.

made against him, and not upon or by force of the writ itself.

Letting by sequestrators.

Where there are no tenants in possession, the sequestrators have not authority to set and let. An order of the Court, on notice to the other side, is necessary to enable them to do this (*m*).

Orders as to management of sequestered property.

Besides orders against tenants to attorn, and orders authorizing the letting of the land, sequestrators should, for their own protection, obtain such orders as may be necessary for the proper management of the estates sequestered, *e. g.*, for felling and sale of timber (*n*), for settlement of accounts for dilapidations with outgoing or incoming tenants (*o*), and the like.

Sect. 5.—Property subject to the Writ and Effect of Writ thereon.

Consequences of sequestration with regard to property of contemnor.

The consequences of the sequestration, when put in force, are different according to the nature of the property seized. The right to the enjoyment of all the contemnor's property is taken away from him, not to be vested in the person pursuing the contempt, but to be held *in medio*, or *in custodia legis*, to await any order the Court may make (*p*).

Conveyance to defeat sequestration.

A conveyance or transfer of property made fraudulently to defeat the sequestration is void as against it (*q*). But

(*m*) *Neale* v. *Bealing*, 3 Swanst. 304; *Ray* v. ——, *ibid.* 306, where the difference in this respect between sequestrators and receivers is adverted to. *Dunkley* v. *Scribnor*, 2 Mad. 443, where necessary evidence is set forth.

(*n*) *Dacres* v. *Chute*, 1 Vern. 161.

(*o*) Order in *Re Burkill*, Seton, 1580, Forms Nos. 98, 99, Appendix, *infra*.

(*p*) Where a party has an interest in the proceeds of a sequestration he can assign it. *Caermarthen* v. *Hawson*, 3 Swanst. 294.

(*q*) *Witham* v. *Bland* (No. 1), 3 Swanst. 276; *Coulston* v. *Gardiner*, 3 Swanst. 279; *Hamlyn* v. *Lee*, 3 Swanst. 301.

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the conveyance or transfer must be fraudulent on the part of both parties, so that a purchaser for value without notice has a good title even against a prior sequestration (*r*). In those cases where the subject-matter of the action is the land which has been sequestered, and it has been conveyed *pendente lite*, the title is bound from the beginning of the action, and the purchaser, for that very reason, comes in at his peril, and cannot set up his title against that of the sequestrators (*s*). There is no necessity, in the case where the sequestrators are in possession, for them to bring an action to have any conveyance declared void as against them. For in such case, the persons claiming under the conveyance and coming in *pro interesse suo*, will fail to show their title, and the possession of the sequestrators will be then assured by the order made on the inquiry.

Duty of sequestrators as to land.

With respect to land of the contemnor, the duty of the sequestrators is to take possession of it, and to keep him out. This duty is the same whether the land held by the

Leaseholds.

contemnor is freehold or leasehold. It should be remembered that, in the case of leaseholds, the sequestrators are not personally responsible to the lessor for the rent and covenants of the lease, although, in order to prevent the exercise by him of any right of re-entry he may have, they may in fact be bound to perform them.

Reversionary interest in land.

It is difficult to see how the sequestrators could take possession of a reversionary interest in land belonging to the contemnor. But, on principle, they are in a position to obtain an order, which would take a form according to the nature of the conveyance or settlement under which the contemnor's title arises. There is nothing in principle to prevent the Courts effectuating the writ in this manner.

Copyholds.

It appears doubtful, both on principle and authority,

(*r*) *Vicars* v. *Colclough*, 5 Bro. P. C. 31.

(*s*) *Crofts* v. *Oldfield*, 3 Swanst. 378; *Bird* v. *Littlehales*, 3 Swanst. 299.

whether the Court will compel a lord of the manor to admit sequestrators as tenants of copyhold lands. At the same time such lands are subject to the writ (*t*).

No sale of lands.

The sequestrators having no estate in the land, cannot obtain an order for the sale of it. They can give no title, and the Court would not compel a purchaser to take a title which he would have to support by an action for an injunction (*u*). The person pursuing the contempt is not, nor is a sequestrator, a creditor to whom the land of the debtor has been actually delivered in execution, and therefore the Court has no jurisdiction to order a sale on a petition under 27 & 28 Vict. c. 112, s. 4 (*x*). In case the action has been instituted in relation to the real estate sequestered, a sale thereof may be obtained, if necessary or expedient, by an order in the action (*y*); but this has nothing to do, nor can it have anything to do, with the sequestration.

Duties with respect to goods.

With regard to personal property of a tangible nature, the duty of the sequestrators is to take possession of it in the hands of whomsoever it may be (*z*). As the title to goods passes by sale and delivery, the sequestrators, although they take no interest in the goods which at common law could have been called property (*a*), can obtain an order to sell, and pay the proceeds into Court, and to take their

Order for sale.

(*t*) *Whitehead* v. *Harrison*, 1 Barnard. 431; *Coulston* v. *Gardiner*, 3 Swanst. at p. 282; *Caermarthen* v. *Hawson*, *ibid.* 294; *Dunkley* v. *Scribnor*, 2 Mad. 443.

(*u*) *Shaw* v. *Wright*, 3 Ves. 22.

(*x*) *Johnson* v. *Burgess*, L. R. 15 Eq. 398, notwithstanding *Re Rush*, L. R. 10 Eq. 442.

(*y*) Where the application for sale is made before final judgment, see and consider 15 & 16 Vict. c. 86, s. 55, repealed by 46 & 47 Vict. c. 49, with the qualification expressed in sect. 5.

(*z*) The sequestration has been treated as binding the goods from the date, at any rate, of its issue in a manner similar to the way in which, at common law, a *fi. fa.* was held to bind the goods from the *teste*. See *Payne* v. *Drewe*, 4 East, 523.

(*a*) That is, in the same sense in which the sheriff is said to have a "special property" in goods seized by him under a *fi. fa.* *Vide*, p. 122, *supra*. See *Brograve* v. *Watts*, Cro. Eliz. 651, where plea that commission issued from court of requests under which goods seized were held demurrable.

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costs (*b*). Notice of the motion for leave to sell should be served upon the contemnor, or at his address for service, for the reason that goods which appear to be his property may not be so in fact (*c*). Though where the contemnor cannot be served, leave will be granted on motion *ex parte* (*d*).

The Court can order a sale of goods under a sequestration, although it has been issued on an interlocutory order, and there is no final order or judgment under which the proceeds are disposed of (*e*).

The application for leave to sell should be made in chambers, as it properly comes within the category of chamber business (*f*).

Stock or shares.

Where there are stocks or shares belonging to the contemnor, the sequestrators can seize them, and take such steps as may be most effectual for enforcing the writ (*g*). It is submitted that they are entitled either to require, for instance, that shares in a limited company should be transferred into their names, or to a charging order over them.

Sequestrators intervening in other proceedings.

The sequestrators can intervene in an action in the Chancery Division to which they are not parties, and obtain an order in that action, charging the funds to which the contemnor is entitled (*h*). And where the contemnor had deposited a sum in Court for purposes of an appeal, or the order for setting down the appeal being discharged, and the sum deposited in Court ordered to be repaid to the contemnor, the sequestrators were held entitled to intervene

(*b*) Form of Order in Appendix, *infra*, No. 99; *Wharam* v. *Broughton*, 1 Ves. Sen. 184. Note that for their own protection the sequestrators can obtain an order for liberty to remove unsaleable goods to a place of safety. *Shaw* v. *Wright*, 3 Ves. 22.

(*c*) *Mitchell* v. *Draper*, 9 Ves. 208; *Ridgway* v. *Davis*, 2 Jones, 507.

(*d*) *Re Rush*, 18 W. R. 417, where he had gone out of the jurisdiction.

(*e*) *Cadell* v. *Smith*, 3 Swanst. 308.

(*f*) *Turner* v. *Clifford*, W. N. (1870) 199.

(*g*) But see *M'Carthy* v. *Goold*, 1 Ba. & Be. 387.

(*h*) *Re Slade*, *Slade* v. *Hulme*, 18 Ch. D. 653, where Mr. Justice Fry sums up the authorities on the point. *Claydon* v. *Finch*, L. R. 15 Eq. 266, where the fund, being in Court, the application by the sequestrators was on petition.

and obtain an order for payment to them (*i*). Again, where the interest of the contemnor in the funds was reversionary, an order for sale of such interest was made on the intervention of sequestrators in the suit (*k*).

Debts due to the contemnor.

It is clear that the writ, in directing the sequestrators to take possession of all the contemnor's personal estate, includes sums of money belonging to him which are in the hands of third persons (*l*). But when the sequestrators endeavour to enforce their writ against such persons, they not being parties to an action before the Court, the practice is usually stated to be, that if any person who admits to having in his hands money or any chose in action belonging to the contemnor, comes in and submits to the order of the Court, the Court can deal with the matter and order the sequestrators to seize, but that if such person resists payment to the sequestrators, a separate action is necessary to enforce the writ (*m*). There is undoubtedly strong authority for this position (*n*); but it is submitted that no satisfactory reason is given why, when the parties are before the Court, the matter cannot be dealt with, without the necessity of issuing a writ (*o*); except, perhaps, the general reason given by Lord Thurlow, that choses in

(*i*) *Conn* v. *Garland*, 9 Ch. 101.

(*k*) *Cowper* v. *Taylor*, 16 Sim. 314. The order made in *Slade* v. *Hulme*, 18 Ch. D. 658, restraining the trustees of the settlement from paying to the contemnor, is sufficient in most cases without asking for a sale.

(*l*) It is said that the words "personal estate" which occur in the form of the writ, and of the order given in *Pope* v. *Ward*, 1 Cox, 194, "do not carry the matter further than goods and chattels." *Sed qu. Johnson* v. *Chippindall*, 2 Sim. p. 66; *Francklyn* v. *Colhoun*, 3 Swanst. 276.

(*m*) Dan. Ch. Pr. 6th ed. 914; Seton, 1578.

(*n*) *Simmonds* v. *Lord Kinnaird*, 4 Ves. 735; *Francklyn* v. *Colhoun*, 3 Swanst. 276; *Johnson* v. *Chippindall*, 2 Sim. 55; *Wilson* v. *Metcalfe*, 1 Beav. 263; *Manton* v. *Manton*, 40 L. J. Ch. 93; *Crispin* v. *Cumano*, L. R. 1 P. & M. 622. The point decided in the last case could hardly arise since the passing of the Judicature Acts; all judges being now endowed with ample power to deal with such a question.

(*o*) It has already been pointed out that by taking an inquiry any person can be brought before the Court to give evidence.

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action could not be reached by process of Courts of equity (*p*). Mr. Justice Fry, in a recent case, made an order against a bank, at the instance of sequestrators, to pay into Court a balance in their hands belonging to the person against whom the sequestration had issued, notwithstanding that the bank did not consent (*q*).

In any event it is clearly settled, that where the third person does submit to the jurisdiction, and admits property or funds in his hands, an order will be made dealing with them, and he is undoubtedly entitled to such an order against himself as will protect him in paying over to the sequestrators (*r*).

Landlord entitled to rent.

The landlord of premises on which sequestrators have seized and sold goods is entitled to be paid arrears of rent out of the fund in Court, the proceeds of such sale, and to move for an order for that purpose (*s*).

Restraint on anticipation.

Where a sequestration is issued against a married woman, her property, or such property as is settled to her separate use with no restraint on anticipation, becomes, it is submitted, subject to the sequestration (*t*). Where, however, there is a restraint upon anticipation, a sequestration would not, on principle, touch future or accruing income. If the income has already become due, and waits only for the married woman to receive it, it has been decided that a sequestration will reach it (*u*).

Annuity payable to contemnor.

Where the contemnor is entitled to an annuity, it can be sequestered in the hands of the person liable to pay it, at any rate if that person, as has been already stated, submits to the order of the Court. The order may extend both to arrears and to future sums to become due (*x*).

(*p*) See *M'Carthy* v. *Goold*, 1 Ba. & Be. 387.

(*q*) *Miller* v. *Huddlestone*, 22 Ch. D. 233.

(*r*) *Wilson* v. *Metcalfe*, 1 Beav. 263.

(*s*) *Dixon* v. *Smith*, 1 Swanst. 457. See, also, *Atty.-Gen.* v. *Coventry*, 1 P. Wms. 306.

(*t*) *Keogh* v. *Catheart*, 11 Ir. Eq. R. 280.

(*u*) *Claydon* v. *Finch*, L. R. 15 Eq. 266. In *Miller* v. *Miller*, L. R. 2 P. & M. 54, where a sequestration issued against a married woman, the question of what property became subject to the writ was left open.

(*x*) *Wilson* v. *Metcalfe*, 1 Beav. 263, p. 270.

Pension of contemnor.

Different considerations apply, however, to those cases where the contemnor is in receipt of a pension. The subject of pensions, and how far they are attachable in satisfaction of a judgment for the recovery of money, will be hereafter discussed. For the present it will be sufficient to say that a pension can be sequestered only where it can be charged or assigned by the owner. An order will not be made, under a sequestration, against the Lords of the Treasury for payment of the pension of a judicial officer (*y*), or of a person compensated by a pension out of the public funds (*z*), nor against her Majesty's Paymaster-General in respect of a good service pension (*a*); the proper order which, in all these cases, the sequestrator can obtain being an injunction against the contemnor restraining him from receiving the pension. This injunction is served on the person or officials paying the pension (*b*).

Sect. 6.—Ulterior Consequences of Sequestration and working out of Rights of Parties thereunder.

Sequestration where contemnor actually committed.

11 Geo. IV. & 1 Will. IV., c. 36, s. 15, sub-s. 16.

Where a person has been committed (*c*) for a contempt in not delivering to any person or persons, or depositing in Court or elsewhere, as by any order may be directed, books, papers, or any other articles or things, sequestrators have the same power to seize and take the same being in the custody of the person against whom the sequestration

(*y*) *Willcock* v. *Terrell*, 3 Ex. D. 323; in this case the judicial officer was a county court judge.

(*z*) *M'Carthy* v. *Goold*, 1 Ba. & Be. 387.

(*a*) *Knight* v. *Bulkeley*, 4 Jur. N. S. 527; 5 Jur. N. S. 817.

(*b*) Notes (*y*), and (*z*), and (*a*), *supra*. What further step could be taken if the officials paid over the pension to the contemnor notwithstanding, does not appear.

(*c*) The committal must clearly have been made before the power given by the section can arise at all. See, however, sect. 8, 32 & 33 Vict. c. 62, the Debtors Act, 1869.

issues, as they would have over his own property, and, thereupon, such articles or things so seized and taken shall be dealt with by the Court as shall be just; and, after such seizure, the Court may make such order for the discharge of the prisoner as to the Court may seem fit (*d*).

Sequestration does not cease by death of contemnor.

Although, as we have seen, the writ of sequestration is a mere process for contempt, it does not cease to run when the contemnor dies leaving property which can be the subject of sequestration (*e*); nor does it fall through by reason of the death of the person entitled to the benefit of it (*f*). Of course no fresh step can be taken, nor order made, without putting the action right in the matter of parties. If at any time the rights of the sequestrators come to an end, an order must be made discharging them before the writ and its authority are determined.

Effect on sequestration of the bankruptcy of the contemnor.

Where the contemnor becomes bankrupt during the pendency of the sequestration, the effect on the title of the sequestrators is, perhaps, somewhat difficult to determine. It would appear that sects. 45 and 46 of the Bankruptcy Act, 1883, to which we have already referred for another purpose (*g*), contemplate the case only where a creditor endeavours to enforce his debt by means of execution, and, if this is the true construction, can only apply to a sequestration in a limited number of cases. This is apparent at once, because it frequently happens that where sequestration is issuable there is no creditor to whom money can be said to be due; for example, where the order, in respect of which the sequestration has issued, is an order to pay into Court to the credit of a cause which has yet to be decided, or where such order is an order to do some act, and, on disobedience, sequestration has issued for the contempt.

(*d*) 11 Geo. IV. & 1 Will. IV., c. 36, s. 15, sub-s. 16. *Vide supra*, p. 224.

(*e*) *Witham* v. *Bland*, 3 Swanst. 276; *Coulston* v. *Gardiner*, *ib.* at p. 282; *Caermarthen* v. *Hawson*, *ib.* 294. And see, as to distinction in this respect between sequestration on mesne and final process [now obsolete], *Burdett* v. *Rockley*, 1 Vern. 58.

(*f*) *Hyde* v. *Forster*, 1 Dick. 132.

(*g*) *Vide supra*, p. 152.

It is submitted that in all such cases as those we have just referred to, the title of the sequestrators, when perfected, is good as against the trustee of the bankrupt's estate.

Effect in bankruptcy of sequestration issued by *judgment* creditor.

It has been decided by the Court of Appeal that where, notwithstanding that the process is only a process for contempt, a sequestration had in fact issued at the suit of a mere judgment creditor, his title under it was not complete, so as to make him a secured creditor within the meaning of the term under the Bankruptcy Act of 1869, until he had done something more than merely to serve the writ on trustees who had a fund in their hands belonging to the bankrupt (*h*).

Discharge of contemnor no discharge of sequestration.

Under the Insolvent Debtors Act (*i*), the discharge of a person attached in prison was held not to discharge the sequestration which had followed upon the attachment (*k*). The enactments of the Insolvent Debtors Act are, however, on this point not at all *in pari materia* with those of the present Bankruptcy Act (*l*).

The proceeds of the sequestration.

The mandate in the writ requires the sequestrators to detain and keep the proceeds of the sequestration in their hands until the contemnor shall have performed the act required or cleared his contempt, and the Court shall make other order to the contrary. It will have been gathered from the preceding remarks that before that period arrives, orders can and will be made with reference to the disposition of those proceeds. Originally, no doubt, the process was used only as a means of coercing the contemnor by keeping him out of possession, and the orders of which we speak for the application of the funds in the sequestrators' hands to the satisfaction or partial satisfaction of the contempt, are of comparatively modern origin (*m*). Since the funds in no

(*h*) *Ex parte Nelson, Re Hoare*, 14 Ch. D. 41. Although *service* of the writ and usual notices seems the first step towards effectuating the writ. *Slade* v. *Hulme*, 18 Ch. D. 653, *sed quære*.

(*i*) 1 & 2 Vict. c. 110.

(*k*) *Tatham* v. *Parker*, 1 Sm. & Giff. 506.

(*l*) 46 & 47 Vict. c. 52, s. 30.

(*m*) *Wharam* v. *Broughton*, 1 Ves. sen. p. 184, where the following

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sense belong to the person prosecuting the contempt, no order will be made without notice to the contemnor (*n*). The Court will also deal with the proceeds obtained from a wrongful exercise of the powers of the sequestrators (*o*).

Order for sequestrators to pass accounts.

Perhaps, the most important order usually made, is that fixing the time and method of accounting by the sequestrators and ordering payment of the balance due from them into Court (*p*).

Discharge of sequestration.

A sequestration continues in full force and effect until an order is made discharging it. When, therefore, the contempt is cleared, or where all the parties consent to the course being taken, the sequestration may be dissolved and the sequestrators discharged. This must, however, be done by order and after providing for the payment of their costs, charges, and expenses (*q*).

Costs of sequestration.

Where the sequestrators have seized the property of the contemnor, it is available, in the first instance, for their costs (*r*), as between party and party (*s*). By their costs is meant, the costs of the writ itself and of putting it into

passage occurs: "For the writ of sequestration does not require the sequestrators to levy to the use of the plaintiff, but only to detain and keep in their hands till the sum is fully paid, the contempts cleared, and the Court make further order to the contrary." Dan. Ch. Pr. 6th ed. p. 909.

(*n*) In cases where by order the funds are to be paid over to a certain person, he has, apparently, an assignable interest in them till the order is performed, and a letter of attorney to act on behalf of such person, as the sequestrators might have done, can be given by him. *Caermarthen* v. *Hawson*, 3 Swanst. 294. In a proper case this might be a convenient course where the premises taken possession of are small.

(*o*) See *Pelham* v. *Harley*, 3 Swanst. 291.

(*p*) Appendix, *infra*. See, also, for example of order where the estates sequestered were considerable, and the rights provided for conflicting, *Pelham* v. *Harley*, 3 Swanst. 291.

(*q*) See form of order in Appendix, *infra*, p. 441, Form No. 100. See *Lord Pelham* v. *Newcastle* (4), 3 Swanst. 293; *Wenman* v. *Osbaldiston*, 2 Br. P. C. 276.

(*r*) *Ward* v. *Booth*, L. R. 14 Eq. 201.

(*s*) *Re Shapland*, 23 W. R. 40; W. N. 1874, 202. Though, in some cases, it would appear that solicitor and client's costs are allowed. Order in *Re Burkill*, Seton, 1580.

execution, including a proper allowance to them for their time and trouble (*t*).

These costs should be first provided for, and where necessary or justified by the nature of the contempt for which the sequestration has issued, sale of chattels and payment of the costs out of the proceeds (*t*), or payment of the costs out of moneys come into the hands of the sequestrators, will be ordered (*t*).

Costs where claimants *pro interesse suo* successful.

When claimants to the property intervene *pro interesse suo* and establish their claim, it has been decided where such claimants are mortgagees, that all rents and profits received by sequestrators who have been in actual possession of the lands, should be applied, in the first place, in the payment of the costs of the sequestration, the claimants being allowed to add their costs to their security (*u*). The costs of successful claimants who are mortgagees, should, there is no doubt, be added to their security, and such is the ordinary rule; but in those cases where this has been recently done, no order has apparently been made as to the funds which the sequestrators have actually in hand (*x*), which, on the authority of the case above quoted, should be applied to their costs. Where, however, the successful claimant is the owner of the property, no provision for the payment of their costs seems to be made in the order, that the sequestrators do account and withdraw (*y*).

(*t*) Form of orders in Appendix, *infra*, Forms Nos. 98, 99. As to amount of allowance, *Wood* v. *Freeman*, 2 Atk. 541; *Prentice* v. *Prentice*, Dick. 188.

(*u*) On the ground that the sequestrators hold the lands *in custodia legis*. *Walker* v. *Bell*, 2 Mad. 21.

(*x*) See the final order in *Alton* v. *Harrison*, given in Seton, 1584, and see Appendix, *infra*, p. 441.

(*y*) See *Hamlyn* v. *Lee*, 3 Swanst. 301.

BOOK III.

EQUITABLE AND STATUTORY METHODS OF EXECUTION OVER PROPERTY.

Methods of execution against property which have been already discussed.

WHERE a judgment or order is in effect that a person do pay money, we have seen that recourse may be had by certain methods to his property to realise the sum he is directed to pay. The methods in use for that purpose hitherto discussed have been three, viz.: the writs of *fi. fa.*, *elegit*, and sequestration. The first two of these have a limited application only, that is to say, each of them applies to particular kinds of property only. Neither of these two writs is available against any other but property which could have been the subject of transfer or conveyance at law. Neither of them is available for all, even of such kinds of property. For instance, stocks, shares in companies and the like, which now are by statute transferable, cannot be touched by a *fi. fa.* Nor at any time could a remainder be extended under an *elegit*. It is true that there appear to be no such limits in the character of the property realizable under the writ of sequestration, but that remedy is given in certain well-defined cases, and besides, from its expensive nature, is only resorted to in practice when complete recompense to the party aggrieved cannot be obtained by other and cheaper methods. It remains, therefore, for us to consider in this Book, in what manner recourse can be had for satisfaction of judgments to property which is not covered by or cannot be realized under the writs of *fi. fa.* or *elegit*.

Sequestration.

Execution against married women.

The subject of execution against married women demands a chapter to itself. The effect of recent legislation relating to this class of persons has been to give to them, with

respect to ownership of property, a *status* which they did not formerly possess. Consequently, a married woman is now liable to a much greater extent as to such ownership than has hitherto been the case, even under the exclusive jurisdiction of Courts of Equity. To understand her peculiar position and the manner in which her property has been reached, it has become necessary that all methods of execution should be first explained.

The chapter on the subject has, therefore, been postponed to this Book, although as a matter of mere logical arrangement, it should perhaps have formed part of Book I.

Arrangement of this Book.

This Book is divided into four Chapters:—

CHAP. I.—Equitable Execution.

II.—Charging Orders over Stock, &c.

III.—The Attachment of Debts.

IV.—Execution against Married Women.

Chapter I. treats of execution against the following kinds of property. Equitable interests in land, such as an equity of redemption; interests in land where the execution debtor has some duty to perform, *e.g.*, where he is a trustee beneficially entitled; legal estates in land which are not extendible under writs of *fi. fa.* or *elegit*, *e.g.*, a remainder; equitable interests in goods and chattels; equitable interests in other kinds of property, *e.g.*, a legacy, a life policy.

Chapter II. relates to the remedy given by statute against stocks and shares in corporations and public undertakings.

Chapter III. comprises a discussion of the different means of attaching choses in action to answer the claim of the execution creditor. Choses in action may be taken for this purpose as including debts properly so called, and the interest or right of the execution debtor to receive reward for services rendered, whether as salary or wages, or as a pension.

Chapter IV. is divided into sections, so as to show the effect of the legislation relating to the subject from 1870 to 1882.

CHAPTER I.

EQUITABLE EXECUTION.

SECT. I. — ACTION TO ENFORCE A JUDGMENT OR ORDER AGAINST INTERESTS IN LAND.

Summary of methods of execution against land already discussed.

WE have seen that a judgment creditor was, by virtue of the Statute of Westminster, entitled to enforce the writ of *elegit* against all legal estates in land which belonged to the debtor at the date of the judgment, or became his at any subsequent period. This right has never been extended to equitable interests of the debtor, and has always been taken as entirely irrespective of the fact that at the time of the extent the land might be in the hands of third persons. Where, however, these third persons were either purchasers, mortgagees, or creditors, they were protected by the Acts passed from time to time providing for registration of judgments.

Creditor's remedy against debtor's equitable interests in land prior to 1 & 2 Vict. c. 110.

Before the statute to which we have so frequently referred of 1 & 2 Vict. c. 110, a judgment creditor could, in certain cases, bring a suit in Chancery to have the benefit of his judgment, and to render available the equitable interests of the debtor in land. The jurisdiction of the Court under this head has been termed the "Equity of the Statute of Elegit," and the true nature of the remedy provided has been thus described by Lord Cottenham, in the leading case on the subject (*a*) :—"The con-

(*a*) *Neate* v. *Duke of Marlborough*, 3 My. & Cr. 407, p. 416. Precisely analogous to the equity of the Statute of Elegit is the equity of the Statute of Frauds, under which equitable terms of years are made available to execution creditors. See *Gore* v. *Bowser*, 24 L. J. Ch. 316, 440.

clusion at which I arrive, however, as to what, on principle, ought to be the rule, is derived from a consideration of the nature of the jurisdiction which the Court exercises in such cases. That jurisdiction is not for the purpose of giving effect to a lien which is supposed to be created by the judgment. It is true that for certain purposes the Court recognises a title by the judgment,—as for the purpose of redeeming, or after the death of the debtor having his assets administered,—but the jurisdiction there is grounded simply upon this, that inasmuch as the Court finds the creditor in a condition to acquire a power over the estate by suing out the writ, it does what it does in all similar cases, it gives the party the right to come in and redeem other incumbrancers upon the property." And, again, "It is, therefore, not correct to say that, according to the usual acceptation of the term, the creditor obtains a lien by virtue of his judgment. If he had an equitable lien he would have a right to come here and have the estate sold (*b*); but he has no such right. What gives a judgment creditor a right against the estate is only the act of parliament (13 Ed. 1, c. 18); for, independently of that, he has none. The Act of Parliament gives him, if he pleases, an option by the writ of *elegit*—the very name implying that it is an option—which, if he exercises, he is entitled to have a writ directed to the sheriff to put him in possession of a moiety of the lands. The effect of the proceeding under the writ is to give to the creditor a legal title, which, if no impediment prevent him, he may enforce at law by ejectment. If there be a legal impediment, he then comes into this Court, not to obtain a greater benefit than the law, that is, the Act of Parliament, has given him, but to have the same benefit, by the process of this Court, which he would have had at law if no legal impediment had intervened" (*c*). His Lordship then went

(*b*) For present law, *vide infra*, p. 300 *et seq.*

(*c*) Page 417.

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on to decide that the issue of the writ of *elegit* was a condition precedent to the right of relief in equity (*d*).

The nature of the jurisdiction thus exercised by Courts of Chancery has formed the subject of discussion in a recent case, where Cotton, L. J., emphasizes the point that the proceedings in equity were instituted and pursued for the purpose of removing difficulties standing in the way of legal execution (*e*). It is this remedy which, until comparatively recent times, was alone known as "equitable execution" (*f*).

The creditor's action for redemption.

The suit to remove legal impediments was in the form of a suit for redemption of the prior incumbrancers standing in the way of legal execution. An action of this kind is still an available (*g*), and in some cases the most advisable, method of execution. The right of the judgment creditor to maintain the action is not based on his having a charge over the land by virtue of his judgment, for he has none. The whole of his right is referable to the extension of the principles of the Statute of Elegit to equitable estates. The rules which we have seen regarded in the case of writs of *elegit* are followed in this action, so far as they can be applied (*h*).

Equitable estates acquired after judgment.

In the same way, therefore, that legal estates acquired by the debtor subsequently to judgment are liable to be taken under an *elegit*, so an equitable interest may found the right of the creditor to an action of redemption, notwithstanding that the debtor has acquired such equitable

(*d*) *Vide infra*, p. 303.

(*e*) *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. at p. 290.

(*f*) In the exercise of this jurisdiction legal principles were strictly followed. See, for example, the cases of *Stileman* v. *Ashdown*, 2 Atk. 608; *Tunstall* v. *Trappes*, 3 Sim. 300; *Stonehewer* v. *Thompson*, 2 Atk. 440; and Prid. Judg. p. 29 *et seq.*

(*g*) The statute 1 & 2 Vict. c. 110, does not affect the right of the creditor to this remedy, *Partridge* v. *Foster*, 34 Beav. 1: nor does sect. 1 of 27 & 28 Vict. c. 112. *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275.

(*h*) And therefore the plaintiff has a right to a receiver. See principle asserted, *Davis* v. *Duke of Marlborough*, 2 Swanst. at p. 132.

interest subsequently to judgment. At the same time a judgment at law never "bound" equitable estates in land, and the purchaser from a debtor of such an estate was not, unless he had express notice, affected by judgments entered up against the debtor (*i*). The Court was in such cases dealing with equitable interests only, and would not give its assistance against a purchaser for value without notice (*k*). This point serves to illustrate the nature of the jurisdiction, but is now of little practical importance, for the reason that, by sect. 1 of 27 & 28 Vict. c. 112, no judgment shall affect land until the same shall have been actually delivered in execution (*l*). It should be said that, at the present time, the question of notice or no notice of a former judgment or a former charge has no effect upon the position of the execution creditor (*m*).

The action for redemption.

The action for redemption, or for removal of legal impediments, is the most convenient proceeding where the equitable estates are of considerable extent or value, or where the necessity is likely to arise for many applications to the Court by reason of conflicting or numerous interests. It is needless to add that, the action being once instituted, all necessary interlocutory orders, such as the appointment of a receiver or an injunction, will be granted (*n*).

(*i*) *Lyster* v. *Dolland*, 1 Ves. jr. 431; *Burden* v. *Kennedy*, 3 Atk. 739; Sugd. V. & P. 14th ed. 521. An equity of redemption is not extendible under the statute, and delivery of the writ to the sheriff is not implied notice of an execution.

(*k*) The effect is analogous to the operation of the Statute of Frauds. "While a judgment binds the legal estate of a party from the time it is signed, it only affects such trust property as he is possessed of at the time of execution sued." *Harris* v. *Pugh*, 4 Bing. 335.

(*l*) *Vide infra*, for discussion of this section.

(*m*) In like manner, the decision in *Greswold* v. *Marsham*, 2 Ch. Ca. 170, where it was held that a mortgagee could not, by foreclosing the mortgagor, escape the liability to pay a judgment creditor who had given him notice, is, in one sense, of antiquarian interest only. The right of the execution creditor at the present day depends upon delivery in execution.

(*n*) See, for cases of injunctions, *Thornton* v. *Finch*, 4 Giff. 515; *Yescombe* v. *Landor*, 28 Beav. 80.

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Lis pendens.

Immediately the action is commenced, it should be registered as a *lis pendens*, notwithstanding that it is said that the fact of such commencement is an actual delivery in execution within the meaning of sect. 1 of 27 & 28 Vict. c. 112, above mentioned. An advantage of proceeding by way of this action is apparent when it is desired to to sell any of the property.

Sale of land upon petition.

A power of sale is given to the Court by sect. 4 of 27 & 28 Vict. c. 112, which is in substance as follows :—

"Every creditor to whom any land of his debtor shall have been actually delivered in execution (*o*) by virtue of any judgment, statute, or recognizance, and whose writ or or other process of execution shall be duly registered, shall be entitled forthwith, or at any time afterwards while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of his debtor's interest in such land, and every such petition may be served upon the debtor only; and thereupon the Court shall direct all such inquiries to be made as to the nature and particulars of the debtor's interest in such land, and his title thereto, as shall appear to be necessary or proper; and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the said Court with respect to sales of real estates of deceased persons for the payment of debts shall be adopted and followed so far as the same may be found conveniently applicable."

Priorities of creditors upon a petition.

And by sect. 5 of the same statute,—"Any other creditors entitled to the benefit of a charge (whether prior or subsequent to the charge of the petitioner) shall be served with notice of the said order for sale, and shall after such service be bound thereby, and shall be at liberty to attend the proceedings under the same, and to have the benefit thereof; and the proceeds of such sale shall be distributed

(*o*) This refers to the provision of sect. 1 of the same act, discussed *infra*, p. 307.

among the persons who may be found entitled thereto, according to their respective priorities."

Application to *elegit*.

The remedy given by these enactments is well adapted to the case of land taken in execution under an *elegit* where the debtor has a saleable interest (*p*); for, in such a case, both the legal and equitable estates in the land will pass to a purchaser on the sale. In the case of equitable execution, however, the benefit to be derived from this statute is not so apparent. Only the debtor's interest can be sold upon a petition presented under it, and therefore it is not advisable, where execution is put in force against equitable interests, to proceed in that manner, specially as there exists a less cumbrous machinery in all cases where the action for redemption, or what is the same thing, for removal of legal impediments, has been begun by the judgment creditor.

Application to equitable execution.

Power of sale under Conveyancing Act, 1881.

By sect. 25 of the Conveyancing and Law of Property Act, 1881 (*q*), "(1) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption in the alternative.

The power of the Court to order a sale.

"(2) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged pro-

(*p*) *Re Bishop Waltham Ry. Co.*, L. R. 2 Ch. 382.

(*q*) 44 & 45 Vict. c. 41. Formerly there was no power to order a sale of the property in an action for redemption without the consent of all parties, just as there was no power of sale at law under an *elegit*.

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perty on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of sale, and to secure performance of the terms.

Security for costs.

"(3) But in an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

Sale without determination of priorities.

"(4) In any case within this section, the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

"(5) The section applies to actions brought either before or after the commencement of the Act.

"(6) The enactment described in Part II. of the Second Schedule to the Act is repealed" (*r*).

It is only under the two enactments of sect. 4 of 27 & 28 Vict. c. 112, and sect. 25 of 44 & 45 Vict. c. 41, above quoted, that the Court has any power to direct a sale of lands taken in execution (*s*).

Contrasting the two enactments.

With regard to the construction which by judicial decision has been placed upon the two sections, it is sufficient here to say that it is a condition precedent to any petition for sale under 27 & 28 Vict. c. 112, that the land should have been actually delivered in execution (*t*), and that

(*r*) 15 & 16 Vict. c. 86, s. 48. This enactment was narrower than the above section. Lord Romilly refused to order a sale under it in the absence of the judgment debtor. *Jones* v. *Bailey*, 17 Beav. 582.

(*s*) The statement is *perhaps* not correct, for it is doubtful to what extent sect. 55 of 15 & 16 Vict. c. 86, giving power to the Court to sell in any suit instituted in relation to real estate, has been repealed by 46 & 47 Vict. c. 49. See sects. 3, 5 (b), and 6 (c).

(*t*) The particular meaning given to this phrase is discussed *infra*, when we come to treat of the provisions of sect. 1 of 27 & 28 Vict. c. 112. *Union Bank of London* v. *Ingram*, 20 Ch. D. 463; *Woolley* v. *Colman*, 21 Ch. D. 169; *Weston* v. *Davidson*, W. N. 1882, 28.

where an action for redemption or foreclosure has been begun, no such condition is necessary, but the application for a sale can be made at any time.

Writ of *elegit* not necessary.

The issue of a writ of *elegit* was, as we have seen, where the judgment debtor had nothing but equitable interests in land, necessary to found the subsequent suit for redemption. Now, however, it has been, in considered decisions, held to be unnecessary. The writ of *elegit* is, in such cases, "a useless and absurd form" (*u*). Although there is no decision on the precise point, it is submitted that the execution creditor may maintain his action, notwithstanding that the debtor has legal estate against which the writ of *elegit* could run, as well as equitable estate against which equitable execution is the only remedy (*x*).

Originating summons.

All proceedings to enforce a judgment or order against equitable interests in land by way of redemption, or removal of legal impediments, must now be taken by originating summons under Ord. LV. r. 15a (*y*).

Sect. 2.—The Charge given by Sect. 13 of 1 & 2 Vict. c. 110.

Judgment creditor's right to a charge under 1 & 2 Vict. c. 110, s. 13.

Entirely separate and distinct from the right of the judgment creditor to proceed, as we have seen, by action for redemption, is the right to a charge given him by sect. 13 of 1 & 2 Vict. c. 110.

That section provides, in effect, that a judgment against any person shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents and hereditaments (including lands and hereditaments of copyhold or customary tenure), of or to which such person shall, at the

(*u*) *Ex parte Evans, Re Watkins*, 13 Ch. D. 252; following *Hatton* v. *Haywood*, L. R. 9 Ch. 229; and *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275.

(*x*) See *In re Pope*, 17 Q. B. D. 743.

(*y*) *Vide infra*, p. 311.

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time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall, at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body, and all other persons whom he might, without the assent of any other, cut off and debar from any remainder, reversion, or other interest in the said lands, tenements, rectories, &c.; and the section goes on to provide that the judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of the Act, or any part thereof, as he would be entitled to in case the judgment debtor had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same. Then follows a proviso that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the entering of the judgment, nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy. The last proviso of the section is that it is not to alter the doctrines of equity with reference to purchasers for valuable consideration (*z*).

Effect of section.

Under this section, that which formerly by force of the Statute of Westminster was a "sort of general lien" upon

(*z*) See the section and general notes, Chitty's Statutes, *sub* tit. Judgment.

lands, now, by force of express enactment, becomes a specific lien; words cannot be more express (*a*). Moreover, the specific lien affects equitable just as it does legal estates, a result which did not happen, as we have seen, under the Statute of Elegit.

No proceedings for twelve months.

It will be observed that the judgment creditor cannot proceed in equity to obtain the benefit of his charge until the expiration of one year after its instance. Even then the creditor's lien is subject to this, that no bankruptcy of the debtor shall have intervened in that year (*b*). The statute itself provides no means of preserving the charge given by it, but this does not prevent the execution creditor taking steps to protect the subject-matter of his security, and, where necessary, to obtain a receiver (*c*). The exercise of this protective jurisdiction may, perhaps, be justified on the general ground of right to remove legal impediments, quite apart from the statute or the charge given by it (*c*). The action for protection of the security should be registered as a *lis pendens* (*d*).

Action to be registered as *lis pendens*.

Registration necessary.

By the 19th section of the Act the judgment could not affect any lands, nor, therefore, could the charge be effectuated until the judgment had been duly registered (*e*). The necessity for registration of judgments under that Act has, however, been done away with, and a system of registration of the writ, or, other *process of execution* substituted. No other registration is now necessary for any purpose (*f*). It would appear, therefore, that a

(*a*) *Rolleston* v. *Morton*, 1 Dr. & War. 171, p. 195. The expression of Lord Chief Justice Denman, that before the Act judgment creditors only had a "hovering security," is singularly appropriate. *Bond* v. *Bell*, 4 Drew. 157.

(*b*) Note the dictum of James, L. J., *Ex parte Evans, Re Watkins*, 13 Ch. D. 252, p. 256.

(*c*) *Partridge* v. *Foster*, 34 Beav. 1; *Vescombe* v. *Landor*, 28 Beav. 80. See also, in analogous case of stock, *Bristed* v. *Wilkins*, 3 Ha. 235.

(*d*) *Lane* v. *Jackson*, 20 Beav. note on p. 540.

(*e*) The Act does not provide that no suit shall be instituted until one year after registration, but only until one year after judgment. *Derbyshire & Staffordshire Ry. Co.* v. *Bainbrigge*, 15 Beav. 146.

(*f*) 27 & 28 Vict. c. 112, s. 3.

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creditor commencing an action to obtain the benefit of this statutable charge should register the action, both under 23 & 24 Vict. c. 38, and as a *lis pendens*.

Estate of the debtor chargeable.

As to the interest of the debtor which is chargeable, the section is express,—"any estate whatever at law or in equity" (*g*). A judgment creditor is not a purchaser. His judgment is not signed or entered with a view to acquiring an interest in his debtor's land, and the section only gives him a new remedy, less circuitous than that to which before he was compelled to resort (*h*). Moreover, the section gives rights only as against the debtor, that is to say, the charge operates only on that which was his property. The section, therefore, of itself, gives no right as against a prior conveyance, whether upon good consideration or voluntary (*i*).

Creditors right to foreclosure.

It appears from the language of the section that the creditor taking authorised proceedings has a right to an order for foreclosure, and the right has been continually recognised (*k*). The late Master of the Rolls, however, on grounds which do not appear from the report, refused such an order, although the judgment creditor was entitled to equitable execution, and its consequent remedy of sale (*l*).

This decision seems to be an isolated one, and there appears to be no reason why, in the few cases in which the

(*g*) *Russell* v. *M'Culloch*, 1 K. & J. 313; *Avison* v. *Holmes*, 1 J. & H. 530. This does not mean proceeds of sale of lands. *Thomas* v. *Cross*, 2 Dr. & S. 423.

(*h*) *Beavan* v. *Earl of Oxford*, 6 De G. M. & G. 507. The principle was recognized even before the statute. *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491; *Ex parte Knott*, 11 Ves. at p. 617.

(*i*) *Beavan* v. *Earl of Oxford*, 6 De G. M. & G. 507, p. 520 *et seq.*; *Eyre* v. *M'Dowell*, 9 Ho. L. Cas. 619.

(*k*) *Jones* v. *Bailey*, 17 Beav. 582; *Russell* v. *M'Culloch*, 1 K. & J. 313; *Messer* v. *Boyle*, 21 Beav. 559; *Beckett* v. *Buckley*, L. R. 17 Eq. 435.

(*l*) *Wells* v. *Kilpin*, L. R. 18 Eq. 298; 44 L. J. Ch. 184, where the question does not seem to have suggested itself that the creditor might be entitled to a charge under this sect. 13. See also *Footner* v. *Sturgis*, 21 L. J. Ch. 741. In *Ford* v. *Wastell*, 2 Phil. 591, the defendant had agreed to the foreclosure decree being made.

section has now any application, the charge should not be rendered effectual by a judgment of foreclosure. As to the parties to the action claiming foreclosure, the debtor and incumbrancers subsequent to the creditor are necessary (*m*). Creditors are such incumbrancers only in case the land is (since 27 & 28 Vict. c. 112) actually delivered in execution, or in case their judgment operates as a charge under this sect. 13 independent of actual delivery.

Parties to action.

By sect. 1 of 27 & 28 Vict. c. 112, to which we have frequently had occasion to refer (*n*), "No judgment, statute, or recognizance to be entered up after the passing of the Act is to affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority in pursuance of such judgment, statute, or recognizance."

27 & 28 Vict. c. 112, s. 1.

The effect of this section upon the sect. 13 which we have been discussing has formed the subject of somewhat conflicting judicial dicta. It appears to have been the opinion of the late Vice-Chancellor Malins that the later enactment repealed the earlier altogether (*o*). But it is submitted that such is not the case (*p*). There is no doubt that since the passing of 27 & 28 Vict. c. 112, in cases where that Act applies, a judgment does not *ipso facto*, and notwithstanding the express provisions of sect. 13 of 1 & 2 Vict. c. 110, give a charge to the judgment creditor.

Is sect. 13 of 1 & 2 Vict. c. 110, repealed?

Something more than the mere judgment is required, viz., that the land should be actually delivered (*q*). This manifestly can only extend to such estates or interests as by their nature admit of an actual delivery (*r*). Section

(*m*) See *Earl of Cork* v. *Russell*, L. R. 13 Eq. 210; *Rolleston* v. *Morton*, 1 Dr. & W. 171.

(*n*) *Vide supra*, pp. 177, 299.

(*o*) *Re Bailey's Trust*, 38 L. J. Ch. 237; *Earl of Cork* v. *Russell*, L. R. 13 Eq. 210. See *Re Duke of Newcastle*, L. R. 8 Eq. 700 *passim*.

(*p*) *Hatton* v. *Haywood*, 9 Ch. 229; *Beckett* v. *Buckley*, L. R. 17 Eq. 435; *Mildred* v. *Austin*, L. R. 8 Eq. 220.

(*q*) *Guest* v. *Cowbridge Ry. Co.*, L. R. 6 Eq. 619.

(*r*) *Hatton* v. *Haywood*, 9 Ch. 229. See *Anglo-Italian Bank* v.

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13, however, has always extended to many interests in land which cannot by their nature be delivered in any sense. It is submitted that the charge given by the section over such interests is still a good charge, and that the section is to this extent unaffected by subsequent legislation.

Interest of debtor, whose land is seized.

An example of such an interest in land is that of an execution debtor whose land has already been seized under an *elegit*. Such an interest cannot be taken in execution by any legal method (*r*), nor can it be delivered in execution. A petition for sale of the lands under sect. 4 of 27 & 28 Vict. c. 112, cannot therefore be presented, and the creditor is thrown back on such other remedy as he may have (*s*). This, it is submitted, is twofold: to proceed by action for removal of legal impediments, in other words, for redemption under the equitable jurisdiction to which we have already referred in this Chapter (*t*), or to have recourse to the charge given him by sect. 13. In either case, under the new practice, his claim should be both for foreclosure and redemption.

Debtor mortgagee of lands.

Another example of the application of sect. 13, where the remedy it gives is the proper, if not the only, means of execution, is the case where the debtor is mortgagee of lands, whether freehold, leasehold, or copyhold (*u*). The machinery for putting an *elegit* in force is not adaptable to this case, for, apart from the great difficulty under a tenancy by *elegit* of working out the rights and duties of mortgagor and mortgagee, an inquest cannot judge of legal

Davies, 9 Ch. D. at p. 283; *Re The Duke of Newcastle*, L. R. 8 Eq. 700; *Backhouse* v. *Siddle*, 38 L. T. 487.

(*r*) *Carter* v. *Hughes*, 2 H. & N. 714.

(*s*) *Re Cowbridge Ry. Co.*, L. R. 5 Eq. 413.

(*t*) Sect. 1, *supra*.

(*u*) The power to seize, under a *fi. fa.*, the document constituting the mortgage, as being a security for money within sect. 12 of 1 & 2 Vict. c. 110, must not be forgotten. Where, however, such seizure is made, it would appear that the sheriff being only empowered to hold the document the creditor would be relegated to his remedy under sect. 13.

title only, the basis of the jury's finding being, for the most part, the possession of the debtor. It is here, therefore, that the charge given by this 13th section has a special value, and should be put in force by means of an action (*x*).

Annuity secured by trust for sale of leaseholds.

Where a judgment debtor is entitled to an annuity under a covenant, secured by an assignment of leasehold property to the debtor upon trusts for sale and to purchase a government annuity in default of performance of the covenant, his interest in the leaseholds could not be seized or sold under a writ of *fieri facias* (*y*). It is at least doubtful whether they could be extended under an *elegit*; and in saying so we do not omit to consider the very general words contained in sect. 11 of 1 & 2 Vict. c 110, giving power to deliver execution of any lands over which the debtor has "any disposing power." Further, as will be more clearly seen when we come to discuss the remedy of execution by the appointment of a receiver, it does not seem to apply. This is for the reason that the right to a receiver over land depends upon the right in equity of the creditor to remove legal impediments against his execution. It is very questionable, therefore, whether such a remedy is properly applicable to a case like that of the annuitant under discussion. It thus appears that the only mode of execution which a creditor would have against the leasehold property in this case would be by proceeding to enforce the charge undoubtedly given him by the 13th section (*z*).

Remainder.

Another example of the effective operation of sect. 13 is that of a remainder, whether legal or equitable. A remainder is undoubtedly charged by the section. Such an

(*x*) *Clare* v. *Wood*, 4 Hare, 81; *Russell* v. *M'Culloch*, 1 K. & J. 313; 1 Jur. N. S. 157.

(*y*) See *supra*, *Scott* v. *Scholey*, 8 East, 467; and generally, chapter on the writ of *fieri facias*.

(*z*) *Harris* v. *Davison*, 15 Sim. 128. The precise form which the order in such an action would take is a matter of some difficulty. 15 Sim. p. 134, note.

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estate in land cannot by any process other than this charge be taken in execution at all. We have already seen that it was an estate to which no rent or services were incident, and, therefore, that an *elegit* did not cover it (*a*); but in the view of the writer, sect. 13, not having been repealed, still applies, so that a remainder can be made available, subject to the requisite conditions being complied with, to the payment of the execution creditor's debt, and an action to foreclose the debtor sustained (*b*).

Debtor's estates tail.

Again, we have discussed the creditor's remedy by the writ of *elegit*, as extended by the 11th section of 1 & 2 Vict. c. 110, against the debtor's estates tail. The effect of that writ, as against the issue in tail, is, as we have seen, doubtful (*c*). The charge, however, given by sect. 13 is binding against them by its express terms (*d*). A judgment creditor, therefore, seeking to enforce execution against entailed land, can issue the *elegit* which will, at any rate, be good for the judgment debtor's life, and then, after waiting the prescribed period, take proceedings to get the benefit of the charge by separate action. This is another case in which, if not repealed, the charge given by the section might be of practical value, notwithstanding 27 & 28 Vict. c. 112.

The judgment in the action.

The claim in an action to obtain the benefit of the charge given by sect. 13 is for foreclosure, and in the alternative for a sale of the premises. The Court has power to order a sale under sub-sect. 2 of sect. 25, Conveyancing Act, 1881, to which we have already referred, and subject to the conditions therein laid down. The judgment given in the action is the ordinary foreclosure judgment, provision being made for other judgment

(*a*) *Re South*, 9 Ch. 369. See dictum of Lindley, L. J., *In re Hamilton*, 31 Ch. D. 291.

(*b*) *In re Duke of Newcastle*, L. R. 8 Eq. 700, which may be said to be a decision against this view, was merely a refusal to afford the particular remedy of a sale on petition presented under 27 & 28 Vict. c. 112.

(*c*) *Supra*, p. 176.

(*d*) A disentailing deed is, however, still necessary, according to *Lewis* v. *Duncombe*, 20 Beav. 398.

creditors besides the plaintiff to come in, at any rate, where they are parties to the action (*e*).

Summons for foreclosure or redemption. O. LV. r. 5a.

It should be mentioned that, both in the action for redemption or removal of impediments, and in the action for foreclosure, the proper procedure is to issue a summons under O. LV. r. 5a, and not a writ. It is also suggested that in all proceedings of this nature, prior and subsequent incumbrancers, as well as the owner of the ultimate equity of redemption, should be made parties, and the claim made both for redemption and foreclosure.

Sect. 3.—Receivers.

Sub-sect. (i).—*When Receivers are appointed.*

Receivers.

We have already mentioned that in a proper case a receiver will be appointed of the property, over which it is desired to put in execution. We have hitherto delayed the discussion of this particular remedy for the reason that, as the appointment can now be made summarily, and without the necessity of an action at all, it is more frequently resorted to than any other method of equitable execution. The jurisdiction of the Court to appoint a receiver is purely equitable (*f*), and of the widest description, but we have only to do with those cases where it is exercised in order to obtain the benefit of a judgment, or order for payment of money.

Receiver where just and convenient. Jud. Act, 1873, s. 25, sub-s. 8.

By sub-sect. (8) of sect. 25 of the Judicature Act, 1873,—"A mandamus, or an injunction, may be granted, or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just

(*e*) See form in *Mildred* v. *Austin*, L. R. 8 Eq. 220, where the order was for a sale, subject to the incumbrances, unless the debtor redeemed within six months. *Carlon* v. *Farlar*, 8 Beav. 525.

(*f*) Mitf. Pl. 133; Kerr on Receivers, Ch. I.

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or convenient that such order should be made, ... whether the estates claimed by both or either of the parties are legal or equitable."

Effect of this enactment on rights of judgment creditor.

With regard to an execution creditor, who takes proceedings for the removal of the legal impediment, this enactment introduces an innovation. He could always in such proceedings obtain a receiver for the protection of his interest, but the receiver's title was subject to the legal authority, whatever it was, *e. g.*, *elegit* or *fi. fa.*, under which the property in question had been delivered in execution.

Summary appointment of receivers.

A greater practical innovation has, however, been wrought by the section in cases other than those where an action is brought to remove legal impediments. The procedure in these cases has been simplified by the decision that the phrase in the sub-section, "interlocutory order," includes an order which may be made after final judgment, and that, therefore, a receiver can be applied for by summons in chambers and obtained after the judgment, and without the necessity of beginning a fresh action (*g*). Taken in conjunction with the decision that the prior issue of an *elegit* is now unnecessary, a receiver is thus in a simple manner placed within the reach of every judgment creditor.

The power of the court under the sub-section.

The words of the sub-sect. (8) are very wide, and give to all the Divisions a larger power than before the Judicature Acts the Court of Chancery possessed (*h*). Another view of the effect of the words seems to be that they give the Court a wider discretion merely, not a greater jurisdiction (*i*). It is clear that, whether under the name of a

(*g*) *Smith* v. *Cowell*, 6 Q. B. D. 75. See *Salt* v. *Cooper*, 16 Ch. D. 544. It is said that since the appointment of a receiver can be obtained summarily, an action therefor is *primâ facie* vexatious. *Proskauer* v. *Siebe*, W. N. 1885, 159. This, however, from the considerations appearing in sects. 1 and 2 of this chapter, seems questionable.

(*h*) Brett, L. J., in *Smith* v. *Cowell*, 6 Q. B. D. p. 78. See, also, *Pease* v. *Fletcher*, 1 Ch. D. 273; *Bryant* v. *Bull*, 10 Ch. D. 153.

(*i*) See phraseology of judgment

wider discretion or increased jurisdiction, there is power in the Courts, where it is just and convenient, to grant a receiver wherever judgment has been recovered.

The application for a receiver is made in the action in which the judgment or order has been made or given (*k*). The application is usually made *ex parte*. Where, however, there are special circumstances in the case, for example, it is suggested, where the title of the execution debtor is not quite clear, it may become necessary for the application to be made by motion or summons, of which notice should be served upon him (*l*). Such cases, however, are of rare occurrence. In the Queen's Bench Division it is the practice for the *ex parte* application to be made by counsel before the judge in chambers.

The application for a receiver.

The appointment of a receiver is said to be in the discretion of the Court (*m*). This is the correct view, at any rate, where the Court is asked to provide for the safety of property in dispute by placing it *in medio* between the parties. It is then "the common interest of all parties that the Court should prevent a scramble" (*n*). But where a creditor has obtained judgment it may be questioned whether, subject to the rule of court immediately to be referred to, he is not entitled to a receiver as of right (*o*); for on a judgment the receiver is not appointed in order to preserve the property *in medio*, but in order to enforce payment of the judgment debt.

How far appointment discretionary.

By O. L. r. 15a (October, 1884),—"In every case in which an application is made for the appointment of a receiver

Rule of court as to appointment of receivers.

of Cotton, L. J., *In re Pope*, 17 Q. B. D. at p. 749, "a judgment creditor would have had great difficulty," &c.

(*k*) Though where one division of the Court has not jurisdiction the judgment or order will be enforced by another division. *Olicer* v. *Lowther*, 42 L. T. 47.

(*l*) For forms, see Appendix, *infra*, Forms, Nos. 101, 102.

(*m*) *Skip* v. *Harwood*, 3 Atk. 564.

(*n*) *Owen* v. *Homan*, 4 H. of L. Cas. 997, p. 1032

(*o*) This would appear to have been the view of the judges in making the rule, O. L. r. 15a, next discussed, for if the matter be one of pure discretion the rule seems hardly necessary.

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by way of equitable execution, the Court or a judge, in determining whether it is just or convenient that such appointment should be made, shall have regard to the amount of the debt claimed by the applicant, to the amount which may probably be obtained by the receiver, and to the probable costs of his appointment, and may, if they or he shall so think fit, direct any inquiries on these or other matters before making the appointment."

Evidence in support of application.

The affidavit or other evidence, therefore, used in support of the application should set forth the particulars of the debtor's property over which the receiver is sought. The mortgage or mortgages thereon should be stated, the rental or estimated rental should appear, and special regard should be had to the value or estimated value of the property, so as to show the value of the equity of redemption over and above the mortgage (*p*). To dispose of the evidence used on the application, there should be an affidavit or affidavits (usually two) of fitness of the proposed receiver, also a consent to act in writing, signed by him and verified.

Considerations weighing with the Court.

The order for a receiver is not made unless there is a sufficient margin of value in the debtor's property to justify his appointment, regard being had to the probability of the plaintiff getting paid part at the least of his debt out of the funds to be received, and to the expense attendant upon the appointment and subsequent proceedings under the order, such as passing receiver's accounts and the like. The amount of the judgment debt, and also the probability of there being any advantage to be gained by the appointment, are further considerations having weight with the Court (*q*).

(*p*) A suggested form of affidavit, with full directions, is to be found in the Appendix, *infra*, No. 103. *I.* v. *K.*, W. N. 1884, 63.

(*q*) Form of order, Appendix, *infra*, No. 105. Where the judgment debt was 20*l.* only, the application was refused. *I.* v. *K.*, W. N. 1884, 63. The practice where the judgment debt is not sufficient to justify the expense of the receiver's acting in the ordinary manner, but

In actions other than creditor's actions or proceedings it is a rule generally followed that neither of the parties nor their solicitors shall be appointed receivers, although, under special circumstances, such a course may be taken (*r*). The reason is the same in all these cases—that no person ought to control his own accounts (*s*). In the case of an application by a judgment creditor, the rule has not been taken to apply with equal force; for the plaintiff continually gets himself appointed receiver, notwithstanding that the application is *ex parte*. The terms upon which the appointments are made vary according to circumstances. It is not an uncommon order for the judgment creditor to get himself appointed without giving security, and on his acting without salary or remuneration (*t*). This is not a proper order, it is submitted, where it is intended that actual possession should be taken, for there, whoever is appointed receiver (and, for the reasons we have alleged, it should be a third person), security ought to be given. Where such third person is not going into actual possession, the purpose of his appointment is merely to give a charge over the property of the judgment debtor, and the creditor's undertaking to be answerable for the receipts of the receiver, without prejudice to prior incumbrancers, is all that is necessary. In such a case, even a third person need not give security (*u*). In ordinary cases, however, the person appointed is meant to take possession by collecting and receiving the rents and profits from those in occupation of the property, and therefore security should be given.

Who may be appointed receiver.

Plaintiff appointed receiver on terms.

Security should be given when possession to be taken.

The order appointing the receiver usually provides that

The security to be given

is yet of sufficient amount to justify the appointment, *e.g.*, between 35*l.* and 50*l.*, an order is made in the form appearing in the note to Form No. 105, Appendix, *infra*.

(*r*) *Sargant* v. *Read*, 1 Ch. D. 600; *Re Lloyd*, *Allen* v. *Lloyd*, 12 Ch. D. 447, p. 451.

(*s*) *Garland* v. *Garland*, 2 Ves. Jr. 137.

(*t*) There was such an order in *Walmsley* v. *Mundy*, 13 Q. B. D. 807. See also *Taylor* v. *Eckersley*, 2 Ch. D. 302.

(*u*) *Hewett* v. *Murray*, W. N. 1885, 53.

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by the receiver.

within a certain number of days he shall give security to the satisfaction of the chief clerk, or of a master. The security is in the form of a recognizance of the receiver, with two or more sureties (*x*). It is usually for double the amount of the annual rental or yearly value of the estate to be collected (*y*). There is no doubt that the debtor, being interested in the *bona fides* and substantial nature of the security, has a right to be present when it is approved. Notice should therefore be given him of the appointment before the master or the chief clerk when the terms of the security are settled (*z*).

Sub-sect. (ii).—*The effect of the Receiver's Appointment.*

Delivery in execution under sect. 1 of 27 & 28 Vict. c. 112.

Immediately the order is made there is a delivery in execution satisfying sect. 1 of 27 & 28 Vict. c. 112 (*a*), and therefore a petition for sale of all the *debtor's interest* in the land may be presented under sects. 4 and 5. The creditor becomes immediately entitled to a charge over the property, notwithstanding that the security may not have been completed (*b*).

Date from which appointment runs.

In order to avoid any question as to the date from which the receiver's appointment is to run, the order should be framed :—"Let R. R., of ———, be appointed receiver to receive the rents and profits of, &c.," and should

(*x*) They must be *bonâ fide* sureties, and not indemnified by control of the fund to be received. *White* v. *Baugh*, 3 Cl. & F. 44.

(*y*) As to security generally, see Seton, 446 ; Kerr on Receivers, 112 *et seq.* For form, see Appendix, *infra*, p. 447, Form No. 109.

(*z*) Strictly, a summons to proceed should be issued, but on an appointment being obtained, it would hardly appear necessary to do more than give notice.

(*a*) *Hatton* v. *Haywood*, 9 Ch. 229 ; *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275 ; *Ex parte Evans, Re Watkins*, 13 Ch. D. 252 ; *In re Pope*, 17 Q. B. D. 743.

(*b*) *Ex parte Evans, Re Watkins*, 13 Ch. D. 252. The giving of security is not, under the usual form of order, of importance in respect to the date of his appointment, nor in relation to its validity. The crucial point with regard to chattels is whether the receiver has in fact taken possession. *Edwards* v. *Edwards*, 2 Ch. D. 291.

provide for security being given, thus:—"And let the said receiver, on or before ———, give security, to be approved of by one of the masters" (*c*). The effect of this order is, that the receiver can act at once before giving security, and the question of his authority so to do cannot arise (*d*).

Relative positions of receivers and sequestrators.

The position of a receiver when appointed is very similar to that of sequestrators under their writ. The principal difference between them consists in the fact that, in the order for the appointment of a receiver, the land, or other property of which he is to take possession, should be clearly defined and set forth (*e*); whereas the authority of sequestrators extends to all property belonging to the contemnor. Again, a receiver is granted only upon application to the Court, but a writ of sequestration in many cases issues as of right. The difference was formerly much greater, because sequestrators, whose title was not recognised at law, nevertheless were authorized to seize the contemnor's property, whether it was legal or equitable; whilst a receiver was never appointed, except in respect of equitable estates or interests (*f*).

General duty of receivers as to taking possession.

The receiver is, in the terms of the order, "to receive the rents and profits" (*g*). He is not thereby authorized to oust anyone from possession. If any such course is necessary, the order should state that the possession is to be delivered up to him (*h*). When land is vacant the

(*c*) See form in Appendix, *infra*, p. 445, No. 105.

(*d*) The question raised in *Ex parte Evans, Re Watkins*, 13 Ch. D. 252, could not, if the order had been framed in the manner suggested, have arisen at all. *Vide infra*.

(*e*) The importance of the property being clearly defined in the order is shown by *Crow* v. *Wood*, 13 Beav. 271.

(*f*) There are a few cases whence the distinctions are to be inferred, rather than gathered, from the decisions themselves. *Rowley* v. *Ridley*, 3 Swanst. 306; *Angel* v. *Smith*, 9 Ves. 335; *Goldsmith* v. *Goldsmith*, 5 Hare, 123.

(*g*) See form in Appendix, *infra*, p. 445, No. 105.

(*h*) *Randfield* v. *Randfield*, 7 W. R. 651. It will be remembered that the authority of sequestrators in this respect, though somewhat doubtful, is wider.

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receiver is entitled to take actual possession, and if any person is in possession he may be compelled to go out, or to pay to the receiver an occupation rent (*h*).

Receiver officer of the Court.

When appointed, the receiver becomes an officer of the Court, and entitled to its protection, so that any person claiming a right to interfere with the possession actually taken by the receiver must first obtain an order of the Court authorizing the interference (*i*). This is so, notwithstanding that the order appointing him contains express protection for the rights of incumbrancers; for the effect of such a clause is, that where the incumbrancer is already in possession the receiver requires a further order against him to enforce his possession, and such further order will not be made without his having an opportunity of combating it. And where the receiver has taken possession the incumbrancer must move the Court (*j*).

Practice on application by third person claiming against the receiver.

Where a third person intervenes, claiming a right to possession as against the receiver, the practice to be followed is as nearly as possible that of the Court of Chancery on applications *pro interesse suo* in the case of sequestration (*jj*). There is no difficulty in working this out before the judges and chief clerks of the Chancery Division; but since every judge has now power to appoint a receiver at chambers of the Queen's Bench Division, the new duties consequently cast upon the masters have occasioned some difficulty. Just as we have seen is the case where such applications are made under a writ of sequestration, a summons is taken out by the claimant; and in the Chancery Division a chief clerk, or in the Queen's Bench Division, a master, investigates the claim and makes his certificate or report. The certificate of the chief clerk may be varied on motion to the judge in Court. The report of

(*h*) See last note. And as to attornment, see Forms in Appendix, *infra*, Nos. 105—107.

(*i*) As in *Gooch* v. *Haworth*, 3 Beav. 428. The application should be made in the action in which the receiver has been appointed. *Searle* v. *Choat*, 25 Ch. D. 723.

(*j*) *Searle* v. *Choat*, 25 Ch. D. 723.

(*jj*) Form of notice of motion in Appendix, *infra*, No. 108.

the master may be varied on summons in chambers, which, in case of difficulty, is referred not to a judge in Court, but to a Divisional Court (*k*).

Operation of the order.

The order for appointment of the receiver operates as an injunction against all those who have notice of it (*l*), and is therefore different in its effect from any other kind of execution. At the same time, an application for an injunction against persons already in contempt in respect of disobedience to the order, will be granted, the injunction being in assistance of the appointment (*m*). To interfere with the possession of a receiver is a contempt of Court, whether the order appointing him has been wrongly or rightly made (*n*). Interference may consist in the mere interception of rents and profits which the receiver is appointed to collect (*o*), or in a depreciatory circular of a business whereof he has been appointed receiver and manager (*p*). The appointment must be complete before any contempt of Court can be committed (*q*), a point which is not of importance in relation to our subject, for the reason that the receiver is appointed *ex parte* and at once.

Proceeding for contempt to be brought by receiver.

The receiver can, and in proper cases ought, to bring before the Court, by motion, anyone who interferes with him in the execution of his duty. He is under no necessity

(*k*) *Walmsley* v. *Mundy*, 13 Q. B. D. 807. That is to say, the master's report is equivalent to a chief clerk's certificate, and not final, as at common law.

(*l*) This view of the order is borne out by *Crow* v. *Wood*, 13 Beav. 271, where the test of the alleged contempt was really whether the order of the Court had been obeyed, not whether its officer had been insulted.

(*m*) As in *Tink* v. *Rundle*, 10 Beav. 318.

(*n*) *Russell* v. *East Anglian Ry. Co.*, 3 Macn. & G. 104, where see form of order when sheriff is in contempt for levying *fi. fa.* in spite of the appointment of a receiver which has been made.

(*o*) *Ames* v. *Trustees of Birkenhead Docks*, 20 Beav. 332, p. 353. And see more in detail Kerr on Receivers, p. 124 *et seq.*

(*p*) *Helmore* v. *Smith* (2), 35 Ch. D. 449. This example is hardly relevant in discussing equitable execution, except to show the extent to which the doctrine of contempt is carried.

(*q*) *Defries* v. *Creed*, 34 L. J. Ch. 607.

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in such cases to bring a separate action. If, however, there is any necessity to take a step in the name of the owner of the legal estate the receiver must apply to the Court for leave. For instance, he cannot distrain upon a tenant without leave, unless the tenant has already attorned to him under the order.

General duties as to accounts.

The general duties of receivers when appointed do not come within the limits of this work. They are subject to the orders of the Court; and it may be stated generally that any act which they desire to perform, and which is not directly authorized by an existing order of the Court, is done at the receiver's risk and on his responsibility. He should, therefore, for his own protection, obtain the necessary orders. To some extent he becomes the agent of the execution creditor (*q*), though he is of course bound to account to all parties. The method of his accounting, of his remuneration, and finally of his discharge, is settled by well-established rules of practice which we do not enter into, but which are to be found in ordinary books of general practice (*r*).

Receiver agent of creditor.

Process against receiver as such.

Where on a receiver's accounts a balance appears to be due from him, the person entitled thereto, or to have the same paid into Court, is not entitled to proceed against him by writ of execution, for example, a *fi. fa.*; the proper process is to obtain an order against him in his capacity of officer of the Court (*s*). But where an order that he do pay into Court has already been made against a receiver and disobeyed, a writ of sequestration may issue against him under O. XLII. r. 4, and O. XLIII. r. 6, without leave (*t*).

(*q*) See *Chinnery* v. *Evans*, 11 H. of L. Ca. 115.

(*r*) Kerr on Receivers; Dan. Ch. Pr.; Seton on Decrees.

(*s*) *Whitehead* v. *Lynes*, 34 Beav. 161; Kerr on Receivers, p. 179 *et seq.*; *Re Bell*, *Foster* v. *Bell*, L. R. 9 Eq. 192.

(*t*) *Sprunt* v. *Pugh*, 7 Ch. D. 567; Kerr, *ubi supra*.

Sub-sect. (iii).—*Nature of Property in respect of which Receivers are appointed.*

Legal and equitable estates.

As we have seen, the power of the Court is not confined to appointing a receiver of equitable interests alone. The receiver may, and apparently in a proper case always might, be appointed to take possession of legal interests, and the question is now always whether it would be just and convenient (*u*).

Kinds of property over which receiver appointed.

At the same time, and although it is not intended to do more than indicate in this part of our subject the main principles guiding the appointment and duties of receivers, we should be omitting a most important part of the law of execution were we not to refer to the kind of property in respect of which this method is particularly available. Speaking generally, a receiver is appropriate to equitable interests in property. Where there is available a legal mode of execution which will accomplish the end sought, *e.g.* a writ of *fi. fa.* or *elegit*, that is the proper means of execution, and in such cases it is not just or convenient for another means to be adopted (*x*). For the most part a legal method of realising a judgment is not available against incumbered property of the debtor.

Receivers of the debtor's interest in property have been appointed at the instance of judgment creditors or to effectuate a judgment or order for payment of money in the cases which we proceed to refer to in detail.

Equitable estates in land.

Equitable estates or interests in land, whether freehold or leasehold, which cannot be extended or seized by the ordinary legal methods, may be subjected to a receiver (*y*).

(*u*) At any rate since Jud. Act. *Pease* v. *Fletcher*, 1 Ch. D. 273; *Re Pope*, 17 Q. B. D. 743.

(*x*) The fact that sequestration is an available remedy does not prevent the Court from granting a receiver in lieu. *Bryant* v. *Bull*, 10 Ch. D. 153; *Stanger Leathes* v. *Stanger Leathes*, W. N. 1882, 71; *In re Coney*, *Coney* v. *Bennett*, 29 Ch. D. 993.

(*y*) As to mortgaged estates, see *Smith* v. *Cowell*, 6 Q. B. D. 75; *Salt* v. *Cooper*, 16 Ch. D. 544; as to equitable interests, *Wells* v. *Kilpin*, L. R. 18 Eq. 298.

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It is now immaterial, there being good and sufficient reason *aliunde* (for example, an equitable mortgage in existence), whether the legal estate is in the execution debtor, or in a mortgagee claiming under him (*z*). There are some equitable interests in land in respect of which there is no doubt of the jurisdiction of the Court to appoint a receiver, but the justice and convenience of so doing is not always clear. For example, where the judgment debtor has contracted to sell lands, of which he is the legal owner, the creditor may either issue an *elegit*, or apply for the appointment of a receiver; although a demurrer to a bill praying relief on behalf of a judgment creditor against purchase-money, payable in respect of certain lands the debtor had sold, was upheld (*a*).

Land whereof debtor is trustee and beneficially interested.

It is submitted that all land, whether freehold or leasehold, which is in the hands of the judgment debtor, subject to trusts or duties to be performed by him, but in which he has a valuable interest, can be made available in execution to the extent of his interest by means of a receiver thereof (*b*).

Equity of redemption in chattels.

A receiver can be appointed in respect of goods and chattels of the debtor, which are subject to a charge, or, in other words, in respect of the equity of redemption in goods and chattels, *e. g.*, when they are subject to a bill of sale. The receiver in such a case cannot, of course, enter into possession where the bill of sale holder insists upon doing so, nor can the latter be compelled to take the amount due to him without a separate action for redemption.

Landlord's

Where a receiver is appointed over and in respect of

(*z*) *Re Pope*, 17 Q. B. D. 743.

(*a*) *Brown* v. *Perrott*, 4 Beav. 585. See *Robinson* v. *Hedger*, 13 Jur. 846; 14 Jur. 784. It is submitted that it is not correct procedure to attach the sum due from the purchaser to the judgment debtor under garnishee proceedings without at the same time obtaining a receiver also.

(*b*) Such cases as *Doe* d. *Hull* v. *Greenhill*, 4 B. & Ald. 684; and *In re Duke of Newcastle*, L. R. 8 Eq. 700, have suggested the remark in the text.

goods, they are not *in custodia legis* in the same manner as when seized by a sheriff. A landlord's right of distress is, therefore, untouched by the order, but he must obtain the leave of the Court before enforcing that right (*c*).

right to distrain.

Where chattels have been seized by the sheriff, and by reason of their constituting the stock-in-trade of a going business their sale might work injury, a receiver will be appointed, at the instance and cost of the claimant, pending trial of an interpleader issue; the Court will not force the sheriff to sell, but will protect him in such a case (*d*).

Stock of a going concern.

It would appear that the Married Women's Property Act, 1882, renders all a married woman's property, which is thereunder her separate property, liable to be taken in execution; but if she has other separate property to which she is entitled under a settlement, or otherwise not falling within the Act, the proper means of execution is a receiver (*e*).

Married women's property.

Where the debtor has an interest in personalty under a will, for example, a legacy, a receiver of it will be appointed. In this case, where necessary, in aid of the execution, an injunction will be granted against the executors parting with the money until the receiver has been properly appointed (*f*). It makes no difference that the estate out of which the money is to be paid is being administered by the Court, the practice being the same here as in the case of a sequestration (*g*). The receiver must, however, complete his title by obtaining a stop order on the fund (*h*). An order for a receiver to receive the

Interest in personalty under a will, *e.g.*, a legacy.

(*c*) *Re Sutton, Sutton* v. *Rees*, 32 L. J. Ch. 437.

(*d*) *Howell* v. *Dawson*, 13 Q. B. D. 67. The business was that of a cab proprietor.

(*e*) *Bryant* v. *Bull*, 10 Ch. D. 153; *In re Peace & Waller*, 24 Ch. D. 405.

(*f*) *Archer* v. *Archer*, W. N. 1886, 66. The injunction here was until a week after the time limited for appearance, but an application for a receiver could follow.

(*g*) *Ante*, p. 286.

(*h*) The mere fact that the stop order has not been formally lodged will not affect the receiver's priority. *Re Galland*, W. N. 1886, 96.

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income of a reversionary interest in personalty has also been made (*i*).

Sum payable under order of another Court.

When the judgment debtor has, under the order of another Court, a fund payable to him, a receiver of it will be appointed, and an injunction against the execution debtor receiving the amount granted (*k*).

Equitable interest under settlement of personalty.

The interest of a debtor under a settlement of personalty may be got at by means of a receiver, in fact, this is the proper process, there being no debt recoverable at law (*l*).

Effect of appointment on duties of trustees of settlement.

In those cases where there are trustees, on whom the duty of distributing or paying over the fund devolves, the effect of the appointment is that the receiver does not dispossess them, but merely stands in the place of the execution debtor to receive from them what he would, but for the appointment, have received (*m*). Where it is sought to obtain an order against the trustees of the settlement, where, for example, they allege any reason under the settlement itself why the fund should not be charged, or where it is sought to pay off prior incumbrancers, an action should be commenced to which the trustees, the execution debtor, and incumbrancers, if any, would be properly made parties (*n*).

No receiver where there is nothing to receive.

It needs hardly to be suggested that no receiver will be appointed where there is nothing to be receiver of; for example, it is submitted, to receive the amount to be obtained for damages in a yet untried action.

Effect of appointment on prior incumbrancers.

In accordance with the general principle, which applies wherever the property of the debtor is made available for

(*i*) *Fuggle* v. *Bland*, 11 Q. B. D. 711.

(*k*) *Westhead* v. *Riley*, 25 Ch. D. 413. The debtor was a solicitor to whom costs were ordered to be paid by the Palatine Court. The fund being in Court, in this case, would not the more appropriate remedy have been by charging order?

(*l*) *Webb* v. *Stenton*, 11 Q. B. D. 518, 530.

(*m*) For an example, see *Oliver* v. *Lowther*, 42 L. T. 47.

(*n*) See *In re Peace and Waller*, 24 Ch. D. 405; *Arden* v. *Arden*, 29 Ch. D. 702.

his debt, that only his interest therein can be touched, the order for appointment of the receiver is always made "without prejudice to the right of any prior incumbrancer, and if any incumbrancer is in possession then without prejudice to such possession" (*o*). This does not in any way encroach upon the principle that any interference with the receiver is a contempt. For, if the prior incumbrancer is not in possession at the date of the order, and the receiver enters, the incumbrancer may go to the Court and insist on an order for the receiver to stand aside. This same course is open to him if the receiver attempts to oust him when he is actually in possession; and if the interference by the receiver with any person rightfully in possession is gross, no doubt the receiver will be punished by being mulcted in costs.

How far receiver holds property for benefit of prior incumbrancer.

The extent to which the receiver holds the property for the benefit of prior incumbrancers is dependent upon the construction of the order appointing him, and upon the knowledge he has of their claims (*p*). The main principle is that so long as funds are in his hands they are *in custodia legis* for whoever can make a title to them, and can strictly only be paid away by the receiver under the special authority of an order of the Court (*q*).

Extent to which appointment is for incumbrancer's benefit.

"The order appointing a receiver is for the benefit of incumbrancers only so far as expressed to be for their benefit, and only so far as they choose to avail themselves of it. The Court would not deprive them of the advantage of their legal estate; they might, perhaps, be obliged to come here to be examined *pro interesse suo;* but this Court would not interfere against them." "I think that the mortgagee of a term, if he chooses not to lay his hands on the rents during the term, must be in the situation of a mortgagee in fee who has suffered the rents to be applied

(*o*) See the Appendix, *infra*, p. 445. Form, No. 105.

(*p*) See the subject discussed, Kerr on Receivers, 118, 119.

(*q*) *Delany* v. *Mansfield*, 1 Hof. 234.

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for purposes other than the satisfaction of his security" (*r*). It follows, therefore, that a receiver is bound to account only to such persons as can obtain an order against him.

General effect of receiver's appointment as to sale, &c.

The mere appointment of a receiver over the interest of the debtor in lands is necessarily somewhat unsatisfactory. It has been already pointed out that there appears to be no power in the Court to realize the corpus or land itself without separate proceedings, either in the form of an action for foreclosure and redemption or of a petition for sale of the land under sect. 4 of 27 & 28 Vict. c. 112 (*s*). If the statutable power of sale with which the Courts have been endowed were extended, so that once a receiver appointed an order for sale of the land in execution might be obtained on mere motion or summons, the method of execution by the appointment of a receiver would afford the simplest and most manageable remedy in all cases where it was desired to realize the sum due out of the rents and profits or of the sale of land in which the debtor had an interest.

Discharge of receiver.

The appointment of a receiver constitutes a charge or incumbrance on the land. As soon, therefore, as the debt and costs have been paid application should be made to the Court for an order of discharge of the receiver and vacation of his recognizance (*t*).

Sect. 4. Registration of Judgments and methods of Execution.

Questionable what is the effect of statutes as to registration.

The subject of this chapter would be incomplete without a reference to the law relating to registration of judgments. It is not at all clear from the statutable enact-

(*r*) Lord Eldon in *Gresley* v. *Adderley*, 1 Swanst. p. 579.

(*s*) *Vide supra*, pp. 300, 301, 307.

(*t*) As in *Jenner-Fust* v. *Needham*, 31 Ch. D. 500.

ments remaining unrepealed on the subject, or from the decided cases thereunder, what is the effect, at the present time, of a registered judgment and process of execution, as compared with a judgment and process of execution which is not registered. It is fortunate, however, that a recent decision has taken away the necessity of treating the question of registration at any length. We submit that the few following remarks will be found to contain for the purposes of this work a sufficient practical treatment of the question—specially as we have already indicated some occasions upon which process should be registered.

Effect of elegit after 1 & 2 Vict. c. 110.

The general effect of an *elegit* both under the Statute of Westminster and the statute 1 & 2 Vict. c. 110, has already been fully discussed in Book I., Chapter IV. of this work. We have seen that its peculiar effect in vesting a conditional estate in the judgment creditor was due to the construction placed upon the former of those two enactments.

Effect of charge under 1 & 2 Vict. c. 110, s. 13.

In sect. 2 of the present chapter we have attempted to show in what cases at the present time sect. 13 of 1 & 2 Vict. c. 110, gives a specific charge or lien over interests in land belonging to an execution debtor. That specific charge or lien operates by no inherent force of a judgment, but by virtue of the statute only.

Sect. 19, 1 & 2 Vict. c. 110, as to registration of judgment.

By sect. 19 of 1 & 2 Vict. c. 110, it was provided that no judgment should by *virtue of that Act* (*u*) affect any lands as to purchasers, mortgagees, or creditors, unless and until such judgment had been registered in the manner pointed out in the section.

Effect of registration on execution by elegit after 1 & 2 Vict. c. 110.

After the passing of this statute matters were in this position, that, as to an *elegit*, if lands were actually extended under the writ there was no necessity for registration at all. The debtor could not make a title or

(*u*) It is not necessary to do more than indicate the construction placed upon these words by a reference to their effect on judgments which had been docketed before the passing of the Act. See Elphinstone on Searches, p. 15.

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deliver the seisin or possession to a purchaser or mortgagee for the reason of the particular estate vested in the tenant by *elegit*. A judgment creditor of the debtor could not extend the land under a second *elegit* for the reason that there was no estate left for him to take (*x*). Of course it is clear that by registration a judgment creditor obtained an additional advantage, for he was safe, and could issue his *elegit* at any time, or delay it for any length of time after the date of the registered judgment, notwithstanding any subsequent purchaser, mortgagee or creditor who might claim to stand against him.

Effect of registration upon charge given by sect. 13, 1 & 2 Vict. c. 110.

As regards the charge given by sect. 13, the law was not the same, because the charge had no existence until registration of the judgment had been made (*y*).

Legislation as to the registration required.

As to the form and nature of the registration required, various statutes were passed (*z*). Finally, by sect. 1 of 23 & 24 Vict. c. 38, it became necessary to register, not only the judgment, but also the writ, suit, or other process of execution. Further, a limitation was placed upon the power which every judgment creditor before the enactment had of issuing execution at any length of time after his registered judgment, and no judgment nor any writ or other process thereon was allowed to affect land unless put in force within three months from the time when it was registered (*a*). The mode of registering the writ and judgment was provided for by sect. 2.

23 & 24 Vict. c. 38, s. 1.

23 & 24 Vict. c. 38, s. 2.

Registration of writ under s. 3, 27 & 28 Vict. c. 112.

By sect. 3 of 27 & 28 Vict. c. 112, every writ or other process of execution by virtue whereof any land shall have

(*x*) *Vide supra*, p. 308.

(*y*) Although the judgment need not have been registered twelve months before proceeding. *Derbyshire, &c. Ry. Co.* v. *Bainbrigge*, 15 Beav. 146.

(*z*) 2 & 3 Vict. c. 11, abolished the old dockets and enacted regulations as to the memorandum or minute of judgment; it also provided for re-registration every five years. 3 & 4 Vict. c. 82, s. 2, protected purchasers, mortgagees, and creditors taking with notice of an unregistered judgment. 18 Vict. c. 15, s. 4, extended this last-mentioned enactment.

(*a*) This statute extended its protection to purchasers and mortgagees only, not to creditors.

been actually delivered in execution, shall be registered as in the last-mentioned Act provided, but in the name of the debtor against whom the writ or process is issued, and no other or prior registration of the judgment is to be necessary for any purpose. It is submitted that the particular registration required under this section is a futile proceeding. The first section of the Act takes away any effect which a judgment might have upon land until the actual delivery thereof in execution (*b*). The registration is not necessary now any more than it has ever been, in cases where there is an actual entry on or delivery of the lands in execution (*c*).

Sect. 3 does not apply where no delivery in execution.

In those cases where the interest in land which is sought to be made available under an execution is not capable by its nature of being actually delivered, the third section above quoted has no application, because it is only after the land shall have been actually delivered in execution that the section in terms applies at all. In cases, therefore, where sect. 13 of 1 & 2 Vict. c. 110, and the charge thereby given, have now any effect, it is submitted that the method of registration here enjoined is useless. If, however, that part of sect. 3 of 27 & 28 Vict. c. 112, which abolishes the necessity for any other kind of registration than that required by the preceding part should be construed not to apply to proceedings on the charge given by sect. 13, the method of registration provided by sect. 1 of 23 & 24 Vict. c. 38, would have to be resorted to. It is in truth impossible to say, until the point has been decided, what in such a case is the proper method of registration; but whatever it be, the following conclusions appear to be justified:

A. Where land is actually delivered in execution, whether by virtue—(a) of a writ of elegit, and freehold, copyhold, or leasehold may be so delivered; or (b) of a

(*b*) See fuller consideration of the subject, *supra*, pp. 189, 307.

(*c*) See judgment of Cotton, L. J., *Re Pope*, 17 Q. B. D. 743.

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writ of *fi. fa.*, leaseholds only being seizable under this writ; or (c) of a receiver, all kinds and interests in land being in just and convenient cases deliverable under this method (*d*),—no registration of the judgment or the process of execution is necessary for any purpose. It will greatly aid in the due comprehension of this matter if it be borne in mind that in the case of completed executions no registration or docketing of the judgment has ever been requisite. The execution is good as against every one, for the reason that it conveys the property, or an interest or estate therein, to the judgment creditor.

B. Where, on the other hand, the debtor's interest in land cannot from its nature be actually delivered, and it is yet covered by the terms of sect. 13 of 1 & 2 Vict. c. 110, registration of some kind is necessary. Registration as a *lis pendens* of the proceedings to obtain the benefit of the charge, should, of course, always be made, and perhaps this would be a complete and satisfactory protection.

(*d*) But where the land was in itself part of the subject-matter of litigation, it would seem to be affected only if the *lis pendens* has been registered.

CHAPTER II.

CHARGING ORDERS OVER STOCKS AND SHARES.

Could not be taken at law or in equity.

Stocks and shares in public companies were not available at law in execution, nor had the Court of Chancery any machinery by which they could be reached to satisfy a judgment debt, though, as we have seen, they might perhaps be seized and appropriated by sequestrators, until the contemnor owning them had submitted or cleared his contempt.

Nature of stocks and shares.

This description of property is for the most part the creation of statute. Stocks and shares, though there are many distinctions between them (*a*), are for our purpose of the same nature. It is true that stock in the public funds has its special characteristics, just as the stock in railway and other public companies (*b*), and that a share in a company really signifies something which may be entirely different, *viz.*, a definite portion of its capital (*c*). These matters do not, however, immediately concern us.

Use of term "chose in action."

In order to keep this branch of our subject distinct from the succeeding chapter, it should be observed that the term "chose in action," which is in strictness applied to rights of action at common law only, is frequently used to describe the nature of stocks and shares, but this use of the term is misleading, or, at the least, unsatisfactory (*d*).

(*a*) See *Morrice* v. *Aylaner*, L. R. 7 H. L. 717.

(*b*) Williams on Personal Property, 13th ed. 253.

(*c*) Lindley on Part. p. 661.

(*d*) See judgments of Lindley, L. J., *Colonial Bank* v. *Whinney*, 30 Ch. D. p. 281 *et seq.*, and *Société Générale de Paris* v. *Tramways Union Co.*, 14 Q. B. D. p. 451.

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Shares to be taken subject to internal regulations of the company.

Stocks or shares are subject to the regulations of the undertaking in which they are held, whether such regulations are purely statutable or the result of agreement merely amongst the members. Any person obtaining a share, therefore, in execution, must take it subject to the constitutional regulations under which it has been issued.

The procedure under which stocks and shares may be taken in execution is wholly statutable, and, being of modern introduction, presents but few difficulties to the practitioner.

O. XLVI. r. 1.

By O. XLVI. r. 1, "An order charging stock or shares may be made by any divisional court (*f*) or by any judge, and the proceedings for obtaining such order shall be such as are directed and the effect shall be such as is provided by the Acts 1 & 2 Vict. c. 110, ss. 14, 15, and 3 & 4 Vict. c. 82, s. 1."

1 & 2 Vict. c. 110, s. 14. Stock or funds in public companies subjected to charging order.

Sect. 14, above referred to, provides: "That if any person against whom any judgment shall have been entered up in any of Her Majesty's Superior Courts at Westminster shall have any government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them, or such part thereof as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; provided that no proceedings shall be taken to have the benefit of such

(*f*) This was apparently inserted to prevent any question like that arising in *Brown* v. *Bamford*, 9 M. & W. 42, where it was decided that only the judge could make the order, though an appeal lay to the Court. See *Morris* v. *Manesty*, 7 Q. B. 674.

charge until after the expiration of six calendar months from the date of such order."

3 & 4 Vict. c. 82, s. 1. Sect. 14 extended.

By sect. 1 of 3 & 4 Vict. c. 82, above mentioned, the provisions of sect. 14 were extended to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stock, funds, annuities, or shares as aforesaid, as also in the dividends, interest, or annual produce of any such stock, funds, annuities, or shares; and whenever any judgment debtor has any like estate or interest in any stock, funds, annuities, or shares, standing in the name of the Accountant-General of the Court of Chancery (*g*), it shall be lawful for such judge to make any order as to such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor, provided that no such order of any judge shall prevent the Governor and Company of the Bank of England, or any public company, from permitting any transfer of such stock, funds, annuities, or shares, or payment of the interest, dividends, or annual produce thereof, in such manner as the Court of Chancery may direct, or shall have any greater effect than if the debtor had charged such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order.

1 & 2 Vict. c. 110, s. 15. Procedure to obtain charging order.

The procedure to obtaining the order, and its effect when obtained, are provided for by sect. 15 of 1 & 2 Vict. c. 110, above mentioned: "And in order to prevent any person against whom judgment shall have been obtained from transferring, receiving, or disposing of any stock, funds, annuities, or shares hereby authorized to be charged for the benefit of the judgment creditor under an order of a judge, be it further enacted, that every order of a judge

(*g*) Now, by virtue of 35 & 36 Vict. c. 44, ss. 4, 6; and of 46 & 47 Vict. c. 29, ss. 2, 10, the Paymaster-General.

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charging any government stock, funds, or annuities, or any stock or shares in any public company under this Act, shall be made, in the first instance, *ex parte*, and without any notice to the judgment debtor, and shall be an order to show cause only, and such order, if any government stock, funds, or annuities standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the Governor and Company of the Bank of England from permitting a transfer of such stock in the meantime, and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorized agent of such corporation, and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer, shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment, and that no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and further, that unless the judgment debtor shall, within a time to be mentioned in such order, show to a judge of one of the said superior Courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute: provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit."

Public company whether incorporated or not.

From the above enactments it clearly appears that a charging order is available to charge stock or shares in any public company in England (whether incorporated or not). This does not, of course, include a mere trading partnership, but any company where the attributes of publicity exist, such as the return of the names and places of abode of the members from time to time, and of the officers appointed to sue and be sued on behalf of the company (*h*), at any rate satisfies the statute.

Who entitled to apply.

We have already seen that, by O. XLII. r. 24, every order of the Court may be enforced against the persons bound thereby, in the same manner as a judgment to the same effect. Any creditor, therefore, who is entitled to payment of money under an order is in a position to apply for the remedy given by these enactments.

Application for order *nisi* and evidence thereon.

The first step which the creditor takes is to obtain an order *nisi*, the effect whereof is fully stated in sect. 15, above-mentioned. The application for this order is made on an affidavit, which sets forth the judgment or order and other the title (if any) under which the applicant claims (*i*), the description of the stock or shares sought to be charged and the interest of the debtor therein, and, when necessary, the source of the deponent's information (*k*).

Sum for which order made must be ascertained.

The order will only be made where the sum sought to be charged is an ascertained sum, and where the judgment or order under which it is payable is for payment to or recovery by some person (*l*). A charging order, therefore, cannot be made in respect of a sum which is to be ascertained by the taking of accounts and payment of what is

(*h*) *MacIntyre* v. *Connell*, 1 Sim. N. S. 225, p. 239; 15 Jur. 529. For other companies ruled to be public companies, see *Nicholls* v. *Rosewarne*, 6 C. B. N. S. 480; 5 Jur. N. S. 1266; *Graham* v. *Connell*, 19 L. J. Exch. 361.

(*i*) See as to analogous case of stop orders, *Wood* v. *Vincent*, 4 Beav. 419; *Lambert* v. *Hutchinson*, 13 L. J. Ch. 336.

(*k*) Form in Chitty's Forms, 478; Dan. Forms, p. 419. See Appendix, *infra*, No. 111.

(*l*) Including, of course, corporate body.

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found due, nor in respect of costs yet to be taxed (*m*), nor (the terms of the statute being that the judgment must have been entered up against a person) where the order is an order for payment into Court (*n*). But a charging order is good, although made before anything is actually due, upon a judgment to pay a sum *in futuro* (*o*).

The order *nisi*.

The application for an order *nisi* may be and usually is made to a master (*p*). It is, although *ex parte*, made by summons (*q*). Where, however, the order is made in the first instance by a judge, the order may be made in the form that the execution debtor's interest be charged for a week, and unless application be within that period made to the Court, and order made to the contrary, it be charged absolutely. The advantage of this mode of procedure is that one order is alone necessary (*r*).

Intitulation of order.

The order, whichever form it takes, should be intituled in the matter of the Acts, and in the matter of certain shares in the particular company which it is sought to charge. There is no other cause or matter in which it need be entitled (*s*).

A refusal to make the order, whether by the master or the judge, is of course appealable.

Varying order *nisi*.

A reasonable time should be limited in the order *nisi* to enable the opposing party to show cause, which he must do (if at all) on the day named in the order (*t*). It was said formerly that where the order was in this respect inconvenient the execution debtor might apply to the judge to vary it (*t*), and that his refusal might be appealed from.

(*m*) *Chadwick* v. *Holt*, 8 De G. M. & G. 584; *Widgery* v. *Tepper*, 6 Ch. D. 364, in effect overruling *Burns* v. *Irving*, 3 Ch. D. 291.

(*n*) *Ward* v. *Shakeshaft*, 1 Dr. & S. 269.

(*o*) *Bagnall* v. *Carlton*, 6 Ch. D. 130. See *Shaw* v. *Hudson*, 48 L. J. Ch. 689.

(*p*) Ord. LIV. r. 12 (l).

(*q*) Dan. Ch. Pr. 939. See Ord. LIV. r. 2. For form of summons and order, see Appendix, *infra*, Forms, Nos. 110, 112.

(*r*) See *Baker* v. *Tynte*, 2 El. & El. 898.

(*s*) *Lord Hastings* v. *Beavan*, 31 L. J. Ch. 546; but see note to Form No. 110, Appendix, *infra*.

(*t*) *Robinson* v. *Burbridge*, 9 C. B. 289.

At the present time, however, it seems clear that the power of adjournment which the Court can exercise upon the day for showing cause, will meet all the practical exigencies of the case, and there seems to be no object in multiplying applications to the Court by issuing a summons to vary the order *nisi* before the day on which cause is to be shown (*u*).

Service of order *nisi*.

The order must be served upon the person or persons, or upon the authorized agent of the corporation, to be restrained thereby. Personal service, although advisable, is not essential (*x*). Where the fund charged is in Court the order must be left at the Chancery Pay Office.

The effect of the order *nisi* in restraining the transfer of the stock or shares is stated in sect. 15. In case of transfer, notwithstanding the charging order, the public company is liable in an action for damages, to which it is a good defence to prove that the debtor's interest was of no value (*y*).

Order absolute.

Upon cause being shown on the day named, either an order will be made varying or discharging the order *nisi*, or an order absolute will be granted. Cause must be shown before the judge in Chambers or other the judge named in the order *nisi* (*z*), charging orders absolute being excepted from the matters over which the masters have jurisdiction (*a*). On the part of the creditor applying for the order the only evidence required, in addition to the affidavit on which the order *nisi* was obtained, is an affidavit of service of such order upon all parties.

Appearance of company where interested.

The public company in which the stock or shares are held may have

(*u*) Notwithstanding note to Chitty's Forms, p. 482. See, however, course of procedure in *Graham* v. *Connell*, 19 L. J. Ex. 361.

(*x*) *Re Paragon and Spero Mining Co.*, 8 Jur. 11.

(*y*) *Gill* v. *Continental Gas Co.*, L. R. 7 Ex. 332.

(*z*) Since the Jud. Acts no question of the jurisdiction of any judge to make the order can arise. See *Miles* v. *Presland*, 4 My. & Cr. 431; *Hulkes* v. *Day*, 10 Sim. 41; *Lord Hastings* v. *Beavan*, 10 W. R. 206. Form of order, Appendix, *infra*, No. 113.

(*a*) Ord. LIV. r. 12 (b).

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an interest in opposing the charging order being made absolute, in which case they, as being parties concerned, should show cause. It is suggested, as an instance of where they might be directly affected, that in the articles of association of many joint-stock companies a clause is inserted giving to the company a lien or first charge over the shares of the members for sums due from them to the company (*b*). However, as a rule, the company is not interested in the matter, and then no appearance on their behalf should be made at the hearing of the order absolute, for their costs will not be allowed unless by a special order (*c*).

Appearance of execution debtor.

The execution debtor may, of course, appear and show cause. He may produce evidence by affidavit, showing what his interest in the stock or shares really is, for it is that interest alone against which the order will be made absolute.

What interest of the debtor may be charged.

Sect. 14 empowers the judge to charge such part of the stock or shares as he shall think fit. As to government stock, it seems impracticable to charge less than the whole of a debtor's interest without the consent of the Bank of England, who will undertake no responsibility in the matter (*d*).

The order *nisi* and the order absolute, although in form two, are in reality but one order. The charge, therefore, which is given by the statute operates from the date of the order *nisi*, so that where, by having entered a suggestion on the record, the judgment creditor was entitled to have execution against the executors, and an administration order had been made against the estate (*e*), and also in the case where a receiving order in bankruptcy had been made

(*b*) *In re Royal Bank of Australia*, 25 L. J. Ch. 649; 2 Jur. N. S. 390. See reference to *Bradford Banking Co.* v. *Briggs*, 12 App. Ca. 29, p. 345, *infra*. See, also, analogous case of bank claiming lien under 39 & 40 Geo. III. c. 36, s. 2.

(*c*) Ord. LXV. r. 27, sub-r. 23.

(*d*) *Stanley* v. *Bond*, 8 Beav. 50.

(*e*) *Haly* v. *Barry*, 3 Ch. 452.

against the judgment debtor (*f*), in both cases after the order *nisi*, but before the order absolute, the charge was held to be good. An order *nisi* cannot be effectual when obtained against a dead person (*g*). The reason given for this decision is, that the Act contemplates cause being shown by the judgment debtor himself. If sound, it seems to follow from this that where the debtor dies after the order *nisi*, but before the order absolute, the creditor must drop all proceedings thereunder and obtain a new order *nisi* against the personal representatives; such a course can only be taken after leave has been given to proceed against them under O. XLII. r. 23 (*g*).

Interest of the debtor which can be charged.

With regard to the kind of interest which can be reached by a charging order, it may be stated generally that whenever the execution debtor's interest is of such a nature that he could if he pleased charge it, this remedy applies. The creditor can take no greater benefit from his charging order than the debtor could himself honestly give (*h*). The stock or shares which can be charged must be stock or shares, and not an annuity granted by a company (*i*), and must be standing in his own name in his own right, or in the name of some person in trust for him. The fact that they are standing in his own name will not suffice; they must be in his own right also. For example, they cannot be charged where the debtor is a trustee of the shares standing in his name. Again, where he has sold them, but they have not been transferred into the name of the purchaser, the vendor is in the position of a trustee for him, and the shares cannot be charged by the vendor's judgment creditor (*k*). The case is the same

"In his own right."

Holder of shares, vendor.

(*f*) *Re Hutchinson*, 16 Q. B. D. 515.

(*g*) *Finney* v. *Hinde*, 4 Q. B. D. 102.

(*h*) Principle of *Whitworth* v. *Gaugain*, 1 Phil. 728. Therefore a charging order cannot be made over a married woman's property settled to her separate use without power of anticipation. *Stanley* v. *Stanley*, 7 Ch. D. 589.

(*i*) *Morris* v. *Manesty*, 7 Q. B. 674.

(*k*) *Gill* v. *Continental Union Gas Co.*, L. R. 7 Ex. 332.

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Debtor executor.

where the holder is merely the nominee of another person (*l*); and, again, where the shares are standing in the debtor's name as executor of a deceased person (*m*). Where the debtor is interested, not in the shares, but in the proceeds of their sale only, the order will not be made (*n*). But where the debtor has a direct interest, however remotely, contingent in the shares, that interest can be charged (*o*). As to the nature of the interest which the debtor must have "in his own right" (*p*), it may be an interest jointly with others and where the shares are in the names of trustees (*q*). And where the interest of the debtor in the stock terminated on his alienation thereof, it was held that a charging order was sufficient to cause a forfeiture of the debtor's interest (*r*). But, notwithstanding that the terms of the gift imposed forfeiture on alienation by the debtor, it was held in one case that dividends already accrued due could be reached, and that an order *nisi* and an order absolute could be made against them (*s*). As there can be no doubt of the capacity of a person owning stocks to mortgage his interest in them whether or not he has mortgaged them before, so there is no doubt that a charging order will affect the interest of the debtor when it is merely an equity of redemption (*t*). It is here

Terminable interest in stock.

(*l*) *Re Blakely Ordnance Co.*, 46 L. J. Ch. 367.

(*m*) *Taylor* v. *Turnbull*, 4 H. & N. 495.

(*n*) *Dixon* v. *Wrench*, L. R. 4 Ex. 154. See *Baker* v. *Tynte*, 2 El. & El. 897; 6 Jur. N. S. 1192.

(*o*) *Cragg* v. *Taylor*, L. R. 2 Ex. 131.

(*p*) As to these words, *Fuller* v. *Earl*, 7 Ex. 796, seems inconsistent with *Gill* v. *Continental Union Gas Co.*, L. R. 7 Ex. 332; *Re Blakely Ordnance Co.*, *Coates' case*, 35 L. T. 617; 46 L. J. Ch. 367.

(*q*) *Churchill* v. *Bank of England*, 11 M. & W. 323; *South Western Loan Co.* v. *Robertson*, 8 Q. B. D. 17.

(*r*) *Montefiore* v. *Behrens*, L. R. 1 Eq. 171; *Roffey* v. *Bent*, L. R. 3 Eq. 759, it being in every such case merely a question of construction of the instrument under which the particular interest arises.

(*s*) *South Western Loan Co.* v. *Robertson*, 8 Q. B. D. 17. See, where the interest of the execution debtor did terminate, *Roffey* v. *Bent*, L. R. 3 Eq. 759.

(*t*) As in *In re Royal Bank of Australia*, 25 L. J. Ch. 649.

that the importance of the general consideration above referred to becomes manifest. A judgment creditor can never become entitled to rank before a mortgagee of prior date to the charging order, so that under no circumstances can an execution creditor obtain priority over prior equitable incumbrancers (*u*). The effect, therefore, of a charging order is not precisely the same, notwithstanding the words of the statute, as if the debtor had made it in the creditor's favour, for in that case the incumbrancers would rank according to the order in which notice was given to the trustees or holders of the stock or shares, whereas the charge only affects the interest of the debtor at the time it is made (*x*).

Priorities between creditor and mortgagees

As regards execution creditors, between themselves they rank in order of the dates of their respective charging orders.

Priorities of creditors *inter se*.

Where any incumbrancer of shares is interested in disputing the validity of a charging order, he may dispute also the judgment on which it is founded. Where, therefore, a charging order was made upon a judgment, to found which there was no cause of action, as in the case of a contract with an infant, it was held invalid, notwithstanding that the defendant was *sui juris* at the time the judgment and order *nisi* were obtained (*y*).

Sect. 14 above quoted prohibits proceedings being taken to *have the benefit* of the charge until the expiration of six months from the date of the order, which is the date of the order *nisi*. After that period he is entitled to all such

Effect of charging order, six months' delay.

(*u*) *Brearcliff* v. *Dorrington*, 4 De G. & Sm. 122; *Scott* v. *Lord Hastings*, 4 K. & Joh. 633. Notwithstanding *Watts* v. *Porter*, 3 El. & Bl. 743; *Nicholls* v. *Rosewarne*, 6 C. B. N. S. 480, which seem to be practically overruled. See, in addition to authorities appearing in cases quoted, *Pickering* v. *Ilfracombe Ry. Co.*, L. R. 3 C. P. p. 251; *Robinson* v. *Nesbitt*, L. R. 3 C. P. 264.

(*x*) *Scott* v. *Lord Hastings*, 4 K. & J. 633, where the reasons for the decision are most ably and concisely given.

(*y*) *In re Onslow's Trusts*, 20 Eq. 677.

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remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor.

This section does not contain any corresponding provision to sect. 13, which we have discussed in the last chapter, that on the execution debtor's bankruptcy within twelve months, the judgment should have no preference in respect of the charge given by that section. During the six months, the remedy of the execution creditor is not confined to the claim for damages given him by the section. He can by active means prevent, before the expiration of the six months, the subject-matter of his charging-order being interfered with, and can by stop-order, injunction, or notice (*z*), restrain dealing with the corpus and the receipt of income therefrom (*a*). It hardly needs to be pointed out that during the six months' interval the execution creditor cannot obtain as against the public company any other security; for instance, cannot require his name to be registered in the books of the company as owner of the shares.

Protective proceedings within the six months.

Where the execution creditor has obtained his charging order, and the six months' delay imposed upon his proceeding has expired, he is in a position to enforce his security. In order to do this he must foreclose the debtor and all incumbrancers ranking after him, and this renders an action necessary (*b*). He cannot establish his absolute right to the fund in a summary manner: thus, where the order has been obtained over a fund in Court, the amount will not be paid out on a petition by the execution creditor unless with the consent of the owner of the stock (*c*). Nor

Enforcement of the charging order.

(*z*) *Vide infra*, p. 345.

(*a*) *Bristed* v. *Wilkins*, 3 Ha. 235; *Watts* v. *Jefferyes*, 3 Macn. & G. 372; see note to *Horsley* v. *Cox*, 4 Ch. p. 94.

(*b*) Under O. LV. r. 5a, perhaps by originating summons, although the phrase "legal or equitable mortgage" contained in the rule is not the best chosen to describe the charge obtained by the charging order.

(*c*) *Whitfield* v. *Prickett*, 13 Sim. 259; *Pearse* v. *Brook*, W. N. 1870, 216.

has the Court jurisdiction to order a sale unless foreclosure proceedings are instituted (*d*). It is clear, therefore, that for the purpose of enforcing the charging order, foreclosure proceedings are essential. In such proceedings it should be distinctly kept in view that the foundation of the plaintiff's title is the charging order. The judgment does not of itself create a charge on personal property (*e*), although, as we have seen, persons interested have the right to go behind the charging order, and call in question the judgment on which it is founded (*f*). Since the charging order can give only such a charge as could be honestly given by the debtor himself, it follows that the creditor, the debtor, and all other incumbrancers, including, where necessary, the public company in which the stock or shares are held, must be made parties to the foreclosure proceedings (*g*).

Parties to action for foreclosure.

Where, as in the simplest case, the stock or shares are standing in the debtor's own name and in his own right, he is the only necessary defendant. The case in which the company must be brought in will be considered immediately.

Interest of execution debtor in stock subject to settlement.

Where the stock or shares charged are standing in the name of a trustee or trustees for the debtor, such trustee or trustees must be made parties to the foreclosure action. The position of the trustees in such cases should be clearly apprehended. The charging order not being made against them does not affect their rights as owner of the stock or shares to the receipt of dividends and the like; the dividends must, notwithstanding the charging order, be paid to them (*h*). When and so soon, therefore, as a charging order is obtained over the interest of the *cestui que trust*

(*d*) *Leggott* v. *Western*, 12 Q. B. D. 287.

(*e*) *Vide Montefiore* v. *Behrens*, L. R. 1 Eq. 171.

(*f*) *Vide supra*, p. 341; *Re Onslow's Trusts*, 20 Eq. 677.

(*g*) See generally, *Macintyre* v. *Connell*, 1 Sim. N. S. 252.

(*h*) *Fowler* v. *Churchill*, 11 M. & W. 57; *Churchill* v. *Bank of England*, 11 M. & W. 323; *Bristed* v. *Wilkins*, 3 Ha. 235.

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in the stock or shares, notice thereof should at once be given to the trustees, who, although, perhaps, not expressly included within the terms of sect. 15 above mentioned, are certainly bound by the order, and cannot, without a breach of trust, pay over the dividends to the execution debtor, but must retain them in their hands to await the result of the foreclosure proceedings. If any question arises as to whether the trustees claim to have a lien over the stock or shares, either under the provisions of the trusts under which they are held, or for indemnification for costs, such claim can be adjudicated upon in the action; and the charging order will be no hindrance to the bank or company transferring in manner ordered by the Court (*i*). In the same way, any questions of priority, or accounting, or the like, which arise as between the creditor as assignee or chargee of the debtor's interest, and the trustees, can be dealt with in the action for foreclosure; such questions have nothing to do with the company. It may be mentioned that where no foreclosure action is pending, the trustees may, if they choose, take proceedings under the Trustee Relief Act (*k*).

The costs of the trustees will, of course, be a first charge upon the interest of the debtor.

When the company is a necessary party.

There is no statutable enactment to prevent the company being also made parties to the forelosure action (*l*). There is, however, as a rule, no advantage in joining them, unless discovery is required from them. Where they are unnecessarily made parties, the action against them will be dismissed with costs (*m*). It has been already pointed out that the charging order operates on the stock or shares subject to the statutable or other regulations of the company affecting them. It is under these circumstances that

(*i*) *Smith* v. *Youde*, 2 F. & F. 376, and proviso at the end of 3 & 4 Vict. c. 82, s. 1, *supra*.

(*k*) As in *Re Onslow's Trusts*, 20 Eq. 677.

(*l*) *Temple* v. *Bank of England*, 6 Ves. 769.

(*m*) *Edridge* v. *Edridge*, 3 Mad. 386; *Perkins* v. *Bradley*, 1 Ha. p. 232; Seton, 284.

questions frequently arise which render it necessary for the company to be made parties to the foreclosure action. It would be beyond the scope of this work to do more than indicate the nature of the questions which come up for decision in these cases. Recent cases afford sufficient illustration of their difficulty and complexity. For example, the decision of the House of Lords, in *Bradford Banking Co.* v. *Briggs* (*n*), may be instanced. It was there decided that one of the articles of association of a limited company, providing for a first and paramount lien over the shares of the members for debts due from them to the company, was subject to the ordinary rules of equity with reference to mortgages, and that, therefore, a person claiming under a charging order ranked as to that claim before the company, who endeavoured to enforce their lien for debts incurred to them subsequent to the charging order by the debtor, the registered owner of the shares.

Practice of obtaining stop order over funds in Court.

An additional security is given to the execution creditor, where the stock or fund is in Court, by the practice of granting a stop order. There is no doubt that, before the Judicature Acts, a charging order made by a common law judge was necessary before a creditor could come into chancery and ask for a stop order, though it was then made as of course (*o*). Since the Judicature Acts, the increased power of the judges to grant injunctions (*p*), no doubt, gives them jurisdiction to make the stop order at any time, and therefore even before any charging order has been made (*q*). The stop order is, in form, merely an injunction (*r*). It does not, of course, initiate proceedings for deciding the rights of the persons interested; it merely protects the fund (*s*).

Where fund in Court

This protection should be obtained wherever the fund

(*n*) 12 Ap. Ca. 29.

(*o*) *Whitfield* v. *Prickett*, 13 Sim. 259.

(*p*) Jud. Act, 1873, s. 25, sub-s. 8.

(*q*) *Hopewell* v. *Barnes*, 1 Ch. D. 630; *Shaw* v. *Hudson*, 48 L. J. Ch. 689.

(*r*) Form in Appendix, *infra*, No. 115.

(*s*) *Lucas* v. *Peacock*, 9 Beav. 177.

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stop order necessary.

charged is in Court. The effect of the charging order is the same as if it had been given by the debtor, and the stop order operates like notice to the trustees of a fund (*t*), and determines the priorities of the persons claiming to be entitled. If the creditor neglects, therefore, to get a stop order, some other incumbrancer of the fund may obtain a charge thereover without notice of the charging order, and by obtaining a stop order, first in point of date, may acquire priority (*u*). Such an incumbrancer can only do this, of course, if he takes without notice of the charging order. In all such cases, therefore, the execution creditor should make an application for a stop order at the same time as for the order *nisi* (*x*), one application being sufficient. If the creditor has obtained a charging order over stock or funds which are not in Court, but which have, nevertheless, been ordered, in a matter with respect to them, to be sold and the proceeds paid to the execution debtor, the creditor must bring a separate action to get the benefit of his charging order; he cannot apply in the matter to which he is not a party (*y*). But where the fund is actually in Court, although it may be subject to an order in the particular action or matter relating to it, the creditor's application for a stop order is properly made in that proceeding without the necessity of a separate foreclosure action (*z*).

Dividends or interest or fund in Court.

Where the fund, or the interest and dividends thereon, are in Court, they may be charged so long as they have not been actually paid out. This is by virtue of 3 & 4 Vict. c. 82, s. 1, which provides for the charging of dividends, interest, or annual produce of the stock or shares (*a*). Even when the cheque has been prepared by the Paymaster-

(*t*) *Macleod* v. *Buchanan*, 33 Beav. 234. The stop order is obtained on summons in Chambers. *Wrench* v. *Wynne*, 28 L. J. Ch. 235; *Walsh* v. *Wason*, 22 W. R. 676.

(*u*) *Warburton* v. *Hill*, Kay, 470.

(*x*) Dan. Ch. Pr. 939.

(*y*) *Newton* v. *Askew*, 11 Beav. 446.

(*z*) *Reece* v. *Taylor*, 5 De G. & S. 480.

(*a*) Similar enactment as to Ireland (16 & 17 Vict. c. 113). See *Saluman* v. *Donovan*, 10 Ir. C. L. R. App. xiii.

General it can be reached by a stop order if it has not actually been paid over (*b*), and this notwithstanding that the Chancery Pay Office account, out of which the cheque will be paid, is a fluctuating balance at the bank merely (*c*). But if it lies in the hands of the Paymaster-General after it has in fact become the property of the execution debtor, the right course is for the sheriff to apply for liberty to seize it under a *fi. fa.* as extended by 1 & 2 Vict. c. 110, s. 12 (*d*).

Power to restrain transfer where public company not a party.

Jurisdiction is given to the Courts by two statutes to restrain the Bank of England, or any other public company, from permitting the transfer of the stock or shares, the subject-matter of the action, although the Bank of England, or such public company, is not a party to the action (*e*). The security of the stock and shares, pending the action, can in this manner be assured.

Notice in lieu of distringas.

Before incurring the expense of obtaining an injunction restraining the Bank of England, or other public company, from transferring the stock or shares, or paying over dividends, the execution creditor could formerly have issued a writ of *distringas* (*f*). This writ is now done away with (*g*), and replaced under the rules by a formal notice. The effect of this notice is temporary merely, and prevents any transfer of the stock or shares without notice to the person issuing it (*h*). Again, where the stock which has been charged is in Court, a stop order can be obtained, in the way we have pointed out, restraining any dealing with the interest of the debtor therein.

These remedies are open to those who claim to be interested in stock or shares, and are therefore available to

(*b*) *Courtoy* v. *Vincent*, 15 Beav. 486; *Robinson* v. *Wood*, 5 Beav. 388.

(*c*) *Witham* v. *Lynch*, 1 Ex. 391; 17 L. J. Ex. 13.

(*d*) *Watts* v. *Jefferyes*, 3 Macn. & G. 422.

(*e*) 39 & 40 Geo. III. c. 36; 5 Vict. c. 5; Seton, p. 284.

(*f*) The effect of this writ and practice is fully treated of in Dan. Ch. Pr. 5th ed. 1540 *et seq.*

(*g*) Ord. XLVI. r. 2.

(*h*) For practice, see *Re Blaksley's Trusts*, 23 Ch. D. 549.

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an execution creditor who has obtained his charge just as to any other mortgagee. The practice is fully set forth in ordinary works on the subject (*h*).

Sale in foreclosure.

In the foreclosure proceedings the same remedy by order for sale can be obtained, as in the case of foreclosure of land (*i*). Sect. 25 of the Conveyancing Act, 1881, applies to stock and shares just as to interests in land (*k*); and before the Act an order for sale could not be made *in invitum*. A sale is frequently the best course in the interests of all parties, and there being no estates in personalty, the fund can be disposed of, and a new fund created for such persons as are interested in remainder (*l*).

(*h*) Dan. Ch. Pr. 6th ed. 1629 *et seq.*; Snow & Win. Ann. Pr.; Ord. XLVI.

(*i*) *Supra*, p. 301.

(*k*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 2.

(*l*) See form of order in *Bristed* v. *Wilkins*, 3 Ha. 235, and in Appendix, *infra*, Form No. 114.

CHAPTER III.

ATTACHMENT OF DEBTS.

It is intended in this chapter to discuss the remedy of a creditor entitled to issue execution against the debts owing to the debtor.

Methods available for attaching moneys.

In the preceding chapters of this work we have already treated of various methods of execution under which money owing, or becoming due from others, to the person against whom a judgment or order has been obtained, may be got in and applied in satisfaction of it. Sequestrators appointed by a bishop under the authority of a writ of *fi. fa.*, or *seq. de bon. eccles.*, can take into their hands and apply towards payment of the sum due, sums of money becoming due, as rents and profits, to an incumbent from his living (*m*). Sequestrators appointed to sequester property, to answer for a contemnor's disobedience, may collect rents and profits of his property, and, perhaps, recover, by a summary process, money owing to him besides such rents and profits (*n*).

Sequestration *de bon. eccles.*

Sequestration in chancery.

Charging order.

Under a charging order, a creditor may recover the dividends accrued and accruing due upon shares in public companies belonging to the debtor, as well as charge the shares themselves with the payment of the sum due to him (*o*). Finally, in all cases where it is just and convenient, a receiver may be appointed at the instance of the creditor. None of these remedies are, however, applicable to the simple case of a creditor desiring to

Receiver.

(*m*) Book I. Chap. VII. *supra*.
(*n*) Book II. Chap. IV. s. 8.
(*o*) Book III. Chap. II. *supra*.

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appropriate, for satisfaction of his debts, money which is owing to his debtor.

Sect. 1.—Procedure relating to the Order for Attachment of Debts.

Ord. XLV. regulates the present practice relating to attachment of debts (*p*).

Garnishee orders.

By r. 1 of that Order,—"The Court or a judge may, upon the *ex parte* application of any person who has obtained a judgment or order for the recovery or payment of money, either before or after any oral examination of the debtor liable under such judgment or order, and upon affidavit by himself or his solicitor, stating that judgment has been recovered, or the order made, and that it is still unsatisfied, and to what amount, and that any other person is indebted to such debtor, and is within the jurisdiction (*q*), order that all debts owing or accruing from such third person (hereinafter called the garnishee) to such debtor, shall be attached to answer the judgment or order; and, by the same or any subsequent order, it may be ordered that the garnishee shall appear before the Court or a judge, or an officer of the Court, as such Court or judge shall appoint, to show cause why he should not pay to the person who has obtained such judgment or

(*p*) The remedy given to execution creditors to attach or render available debts due to their debtors has a very short history, and was first introduced by the C. L. P. Act, 1854, sects. 60—67 (inclusive) of which regulated the practice until the passing of the Judicature Act, when their substance was incorporated in the Rules of Court. The rights given by the C. L. P. Act, 1854, were rights enforceable in the common law Courts only, and not in Chancery. See sect. 99 of the Act; and *Horsley* v. *Cox*, L. R. 4 Ch. 92. The Act is now repealed, and the whole law rests upon the rules and orders. 46 & 47 Vict. c. 49.

(*q*) In Ireland, in a case where the head office of an insurance company was in London, it was held that no order could be made against it. *Martyn* v. *Kelly*, Ir. R. 5 C. L. 404.

order the debt due from him to such debtor, or so much thereof as may be sufficient to satisfy the judgment or order."

Person entitled to proceed.

Any person who has obtained (*r*) a judgment or order for recovery of money is in a position, subject, it is submitted, to the provisions of O. XLII. rr. 2 and 9, referred to at length, *supra* (*s*), to proceed to the remedy given by this rule (*t*). The judgment or order of this rule does not, of course, include an order for payment into Court, or for payment in any other manner than to a person (*u*).

Judgment or order.

The extension of the remedy of attachment of debts, to cases where the creditor is entitled under an order, is new: the remedy was, before the rules of 1883, confined to creditors on judgments (*x*).

Prior exami-

The application is usually preceded by the examination

(*r*) The assignee of a judgment debt is included in these words, the rules being framed to carry out the provisions of sect. 25, sub-sect. 6 of the Judicature Act. *Goodman* v. *Robinson*, 18 Q. B. D. 332. See also as to meaning to be given to the words, *Re Frankland*, L. R. 8 Q. B. 18. In the case of bankruptcy the original judgment creditor is the only person who has a right to serve an effective notice, the Bankruptcy Act contemplating strictly the person who has actually obtained judgment. *Ex parte Blanchett*, 17 Q. B. D. 303. An executor of the judgment creditor is entitled to apply for an order after having obtained the usual order for change of parties. *Baynard* v. *Simmons*, 5 El. & Bl. 59.

(*s*) Book I. Chap. I. p. 16, *supra*.

(*t*) Unless he is not entitled to issue execution, as, for example, if execution is stayed, or if he is one of many bondholders who are to be paid *pari passu*. *Kennett* v. *Westminster Improvement Commissioners*, 11 Exch. 349.

(*u*) Including a corporation. Ord. LXXI. r. 1. See, as to company in liquidation, note (*f*), *infra*, p. 359.

(*x*) The decisions relating to this question before the Rules of 1883 were *Hartley* v. *Shemwell*, 1 B. & S. 1; *Re Price*, L. R. 4 C. P. 155; *Re Frankland*, L. R. 8 Q. B. 18; *Best* v. *Pembroke*, L. R. 8 Q. B. 363; *Crenetti* v. *Crom*, 4 Q. B. D. 225; *Commissioners of Donations* v. *Archbold*, 14 Ir. C. L. R. 67. *Re Price*, *ubi supra*, was a decision upon an order obtained by the liquidator of a company for payment of calls. It does not appear what order this was; but even at the present time the order for payment of calls is for payment into a bank, and execution cannot issue until payment to the liquidator himself is ordered. See sect. 103, Companies Act, 1862; Gen. Ord. 1862, r. 38.

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nation of debtor.

of the debtor under O. XLII. r. 32, the practice on which we have already discussed; but such an examination is not essential.

Whether it has been made or not, the application must be founded upon an affidavit, in accordance with the terms of the rule. A form of affidavit will be found in the Appendix (*y*).

To whom application made.

The application is made in the Queen's Bench Division to a master, and in the Chancery Division to the judge in Court.

The garnishee.

It will be observed from the terms of the rule that the principal order obtained attaches all debts owing or accruing to the garnishee. The garnishee, though that description includes a corporation, cannot be a firm, *i.e.*, there is no provision for a garnishee order being made against a firm: the members of it are liable as garnishees in their proper names only (*z*).

We shall shortly discuss the effect of this order on points of priority and the like, and also the kind of debts owing or accruing which are covered by it. The usual form of order will be found in the Appendix (*a*).

The two parts of the order.

The usual order consists of two parts, that which purports to attach the debt or debts, and that which summons the garnishee to show cause why an order should not be made against him for payment. It is submitted that where the debt sought to be attached is payable *in futuro*, the latter part of the order should not be made simultaneously with the first, for the reason that, on the garnishee attending, no order for payment would be made against him (*b*). At the same time, it must be pointed out that where a sum is payable by the garnishee in instalments, and one instalment *is due*, an order may be made

(*y*) *Vide infra*, Appendix, Form No. 116, p. 452, and note.

(*z*) *Walker* v. *Rooke*, 6 Q. B. D. 631.

(*a*) *Vide infra*, Appendix, Form No. 117, p. 453.

(*b*) See terms of order for payment, Appendix, *infra*, Form No. 118, p. 453, which only provides for payment forthwith.

for payment of the other instalments as they become due, and successive executions may regularly issue without further order (*c*).

Where the debt is actually due or owing by the garnishee, one order is usually made, including both the attachment and the summons, to show cause. Service of the order is provided for by rule 2 of the same O. XLV. By that rule, "Service of an order that debts due or accruing to a debtor liable under a judgment or order, shall be attached, or notice thereof to the garnishee, in such manner as the Court or judge shall direct, shall bind such debts in his hands" (*d*).

O. LXV. r. 2. Service of order and its effect.

It would appear from this rule that service of the order must be personal, unless otherwise directed. It is more convenient, therefore, in many cases to take, on the *ex parte* application, special directions as to service. For example, where the garnishee or garnishees are trading under a firm name, although the order cannot be made in that name (*e*), it is submitted that a direction may be obtained for the order to be served in the same manner (under O. IX. rr. 6, 7) as if it were a writ of summons issued against a firm.

The service required.

By O. XLV. r. 3, "If the garnishee does not forthwith pay into Court the amount due from him to the debtor, liable under a judgment or order, or an amount equal to the judgment or order, and does not dispute the debt due or claimed to be due from him to such debtor, or if he does not appear upon summons, then the Court or judge may order execution to issue, and it may issue accordingly, without any previous writ or process, to levy the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the judgment or order" (*f*).

O. XLV. r. 3. Enforcing order against garnishee.

(*c*) *Tapp* v. *Jones*, L. R. 10 Q. B. 591. As to the distinction between the two parts of the order, it may be well to refer to *Sparks* v. *Younge*, 8 Ir. C. L. R. 251.

(*d*) The effect of the words "shall bind the debts in his hands" is discussed *infra*, sect. 3.

(*e*) *Walker* v. *Rooke*, 6 Q. B. D. 631.

(*f*) This rule reproduces sect. 63, C. L. P. Act, 1854.

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Trial of question of garnishee's liability.

By O. XLV. r. 4, "If the garnishee disputes his liability, the Court or judge, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined" (*g*).

Form of the order.

These two rules regulate the procedure after service of the order upon the garnishee summoning him to show cause. The form of the order against him, given in the Appendix to the Rules of Court (*h*), is in the form: "It is ordered that the garnishee do forthwith pay," and then goes on to direct issue of execution on default. It is a mere technical matter, but the part of the order which we have quoted is not expressly authorized by the rules (*i*). It has, however, been decided that such an order may be made, even for payment of sums to become due *in futuro* (*j*).

Question as to liability.

The garnishee may dispute that the alleged debt from him is due (*k*). If he does so the question cannot be decided by the master or judge before whom the order to show cause is returnable, but must be determined in the manner provided for by rule 4 (*l*).

Discretion in Court or judge.

By this rule there is, however, no doubt a discretion given to the Court or judge to refuse to direct the question to be tried. The grounds for disputing the debt must be substantial, or show that there is a question to be tried,

(*g*) The procedure provided, under sect. 64, C. L. P. Act, 1854, was, that the judgment creditor might sue the garnishee in an action in the nature of a *sci. fa.*

(*h*) Appendix K, No. 40. *Vide infra*, Appendix, Form No. 118.

(*i*) It is suggested that, perhaps, this is the reason why the late M. R. refused, as is said, to make an order *for payment* in the absence of the judgment debtor. See Dan. Forms, p. 422.

(*j*) *Tapp* v. *Jones*, L. R. 10 Q. B. 591. The order even when made absolute is not a final judgment within sect. 4, sub-sect. 1 (g), of the Bankruptcy Act, 1883. *Ex parte Chinery*, 12 Q. B. D. 342.

(*k*) Which expression includes, of course, the case of *debitum in præsenti solvendum in futuro*, as well as a denial altogether of indebtedness.

(*l*) For forms of order for trial of question by issue and special case, *vide infra*, Appendix, Forms Nos. 119, 120, p. 454.

otherwise the order for execution will be made (*m*). The garnishee should therefore show by affidavit the grounds on which he relies for disputing the debt. The issue or question for determination is, whether at the date of the order of attachment there was a sum due from the garnishee to the debtor (*n*). And therefore the garnishee is in the position of a defendant in an action, to the extent that he can, on appearing, force the creditor to take proceedings to try the question or to have the order of attachment discharged (*o*).

Payment into Court where no dispute.

If the garnishee does not dispute the debt being due he should pay the same into Court on or before the return day of the order to show cause, otherwise execution may issue against him forthwith. He may be ordered, under O. XLII. r. 32, to be orally examined as to the debts due to him, and, apparently, garnishee proceedings taken against him (*p*).

Sect. 2.—What can be attached under the Order.

It is proposed to consider the subject of this section in two parts:—

1. Ordinary debts owing or accruing;
2. Execution against pensions and other periodical payments.

(*m*) *Newman* v. *Rook*, 4 C. B. N. S. 434; *Wise* v. *Birkenshaw*, 29 L. J. Ex. 240. "The mere assertion by the garnishee that he disputes the debt amounts to nothing:" Willes, J., 4 C. B. N. S. 440. Where a *bonâ fide* action is *being proceeded with* as to the debt between the judgment debtor and the garnishee, although the order to attach may be made, the creditor will be refused an order for execution or for trial of the question. See *Richardson* v. *Greaves*, 10 W. R. 45. For an example of a case where question ordered to be tried, see *Seymour* v. *Corporation of Brecon*, 29 L. J. Ex. 243.

(*n*) *Macdonald* v. *Tacquah Gold Mines Co.*, 13 Q. B. D. 535.

(*o*) See *Wintle* v. *Williams*, 3 H. & N. 288.

(*p*) *Cowan* v. *Carlill*, 52 L. T. 431.

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SUB-SECT. (i).—*Ordinary Debts Owing or Accruing.*

Definite sum.

Legal and equitable debts.

It would appear that wherever there is a definite sum due to the execution debtor it comes within the words "debts owing or accruing," and can be attached. And since the Judicature Act, it is of no consequence that the sum is not an amount which would have been recoverable at law, provided that it might have been in equity. In other words, both legal and equitable debts are now attachable (*q*). We propose to discuss, first, what legal debts are attachable, and then proceed to describe what is meant in this connection by an equitable debt.

As will appear, these two classes are entirely distinct, by reason of the different form of remedy which was formerly resorted to.

Legal debts.

As to legal debts, the sum attachable must be an ascertained and definite amount.

Unliquidated sum.

An unliquidated amount due under a covenant for breach of it is not, therefore, attachable (*r*). And where notice to treat has been given by a public body, under the provisions of the Lands Clauses Consolidation Act, 1845, although a contract for sale and purchase of land is thereby constituted, the price is not fixed, and the amount, notwithstanding that it is ascertainable by a jury, is not attachable (*s*).

Impeachment of a settlement.

A right of action which the creditor may have to impeach a settlement of money made by the debtor is one thing, but in such a case it is mistaken procedure for him

(*q*) *Wilson* v. *Dundas*, W. N. 1875, 232; Bitt. cxii.; *Summers* v. *Morphew*, 61 L. T. Jo. 140; *Re Cowan's Estate*, 14 Ch. D. 638; dicta of the Lords Justices in *Webb* v. *Stenton*, 11 Q. B. D. p. 526.

(*r*) The covenant was a covenant to indemnify against payment of costs, and an attachment applied for by the person to whom the costs were due was refused. *Johnson* v. *Diamond*, 11 Exch. 73. It is submitted that, in the face of this case, the decision in *Daniel* v. *M'Carthy*, 7 Ir. C. L. R. 261, is of questionable authority. See, also, *Nash* v. *Pease*, 47 L. J. Q. B. 766, which, it is submitted, is practically overruled by *Webb* v. *Stenton*, 11 Q. B. D. 518.

(*s*) *Richardson* v. *Elmit*, 2 C. P. D. 9.

to take garnishee proceedings against the trustee of the settlement (*t*).

Second requisite: sum must be recoverable.

The sum attachable must be one which the debtor could, if it had actually accrued due, and but for the attachment order, recover from the garnishee by action (*u*). It would not be correct to assert that such action must be an action in the nature of an action of debt, technically known as such at law. On the contrary, where there is an ascertained sum in the hands of the garnishee, it can be attached, although the action of "debt" would not have lain for it at common law (*x*).

Action of "debt."

Money had and received.

And where an action for money had and received would lie at the suit of the debtor, the amount can be garnisheed, as, for example, where it is the proceeds of an execution in the sheriff's hands (*y*). *A fortiori*, where the garnishee could be sued for the sum due from him as a debt, as in the case of a banker, the order attaching and for payment will be made (*z*).

Sum attached larger than judgment recovered.

Where the amount due from the garnishee is an ascertained sum larger than the sum due to the judgment creditor, it can, under the express terms of rule 1 of O. XLV., which we have referred to, be attached to a sufficient amount to satisfy the debt.

Debt due to debtor and

Where the debt sought to be attached is a debt due to

(*t*) *Vyse* v. *Brown*, 13 Q. B. D. 199. And where the garnishees were trustees of a will, who were bound to manage a business and pay proceeds to debtor, it was held that garnishee proceedings were wrong. *Horsley* v. *Cox*, 4 Ch. 92.

(*u*) The debt, of course, must be due in the sense of not having been paid or satisfied. As to the effect of payment by cheque and garnishee order before cheque is presented, see *Cohen* v. *Hale*, 3 Q. B. D. 373; *Elwell* v. *Jackson*, 1 C. & E. 362.

(*x*) *Tross* v. *Michell*, Cro. Eliz. 172; *Michill* v. *Hores*, 1 Leo. 321. The action in such cases was in form *indebitatus assumpsit*.

(*y*) *Murray* v. *Simpson*, 8 Ir. C. L. R. App. xlv.; *O'Neill* v. *Cunningham*, Ir. R. 6 C. L. 503. Where the sum in the sheriff's hands is obtained under an attachment issued out of the Court of Chancery, since money had and received would not lie for it, it cannot be attached. *Williams* v. *Reeves*, 12 Ir. Ch. R. 173.

(*z*) The relation of banker and customer is simply that of debtor and creditor. *Foley* v. *Hill*, 2 H. L. Cas. p. 39 *et seq.* See *Pott* v. *Clegg*, 16 M. & W. 321.

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another unattachable.

the judgment debtor and another person, it cannot be attached to answer the debt of the former (*a*). The right course in such a case is for the creditor to apply for equitable execution. The converse case, of a judgment against several debtors and a debt due by the garnishee to one of them, presents no difficulty; in analogy to other cases of execution, the debt can be attached (*b*).

Verdict recovered but judgment not signed.

Although a verdict has been obtained in favour of the debtor in an action brought by him for unliquidated damages, the sum thus ascertained is not a "debt owing or accruing." "It is not sufficient that in all probability there will be a debt," and judgment must be signed before the amount can be garnisheed (*c*). The phrase "accruing debt" cannot mean any debt which may at any future time arise between the judgment debtor and the person sought to be made a garnishee, there being no contract at that time between the judgment debtor and such person, or anything which can make any relation of any kind, legal or equitable, between them. To state the proposition is to show its absurdity (*d*).

No garnishment where action barred.

Garnishee proceedings cannot be taken where the remedy by action is taken away or is barred; for example, dividends due to the debtor from an estate in bankruptcy cannot be garnisheed against the trustee, for the reason that by sect. 63 of the Bankruptcy Act, 1883, it is expressly enacted that no action shall lie against him therefor (*e*).

(*a*) *Macdonald* v. *Tacquah Gold Mines, Limited*, 13 Q. B. D. 535. This may, it is submitted, be said to be for two reasons; first, because the sum due to the debtor is not ascertained, and second, because he by himself could not recover the amount by action.

(*b*) *Miller* v. *Mynn*, 1 El. & El. 1075.

(*c*) *Jones* v. *Thompson*, E. B. & E. 63. Money awarded under a rule of court cannot be attached under the custom of the city of London, notwithstanding that the sum was ascertained by the master's allocatur. *Coppell* v. *Smith*, 4 T. R. 312; *Re Frankland*, L. R. 8 Q. B. 18. Even where judgment has been signed, it does not always follow that the debt is "due or accruing due." *Howell* v. *Metropolitan District Ry. Co.*, 19 Ch. D. 508.

(*d*) Brett, M. R., in *Webb* v. *Stenton*, 11 Q. B. D. p. 523.

(*e*) See *Boyse* v. *Simpson*, 8 Ir. C. L. R. 523; *Gilmour* v. *Simpson*, 8 Ir. C. L. R. App. xxxviii.; *Re Greensill*, L. R. 8 C. P. 24.

Similarly, a garnishee order will not be made against the liquidator of a company in respect of a dividend in his hands payable for the debt of the company (*f*). But where the liquidator of a company is carrying on the business for the beneficial winding-up of the same, and debts due to the company are thus incurred, it is submitted that creditors, then becoming such, can attach them.

Liquidator of company.

Where a condition has to be performed by the debtor before the money is payable to him by the garnishee, the same cannot be attached. This appears to be reasonable, because there is no machinery to compel the creditor to perform the condition. Where, therefore, after verdict and judgment for compensation for compulsory purchase, judgment for specific performance had been obtained against the company, it was held that there was no attachable debt, because the money was not due except on executing or tendering a conveyance to the company (*g*).

Sum payable under condition unattachable.

Where the debtor is the holder of a negotiable instrument which has been endorsed to him, the debt due under it cannot be attached, for the order would prevent negotiation (*h*).

Debtor holder of promissory note.

The garnishee should be careful to appear and defend in all cases where the proceeding can be objected to, it will be too late for him to refuse to pay after the order against him has been made by default. Therefore, where the claim of the judgment debtor against the garnishees was for an unliquidated amount, it was held that they could not dispute the order for payment, which they had allowed to go against them (*i*).

Garnishee order by default.

(*f*) It may be, *perhaps*, made against the company, subject to leave being granted to take the proceeding (under sect. 87 Companies Act, 1862), and subject to the claims of the liquidator. *In re Warwick and Worcester Ry. Co., Prichard's Claim*, 2 De G. F. & J. 354; *Dawson* v. *Malley*, Ir. R. 1 C. L. 207.

(*g*) *Howell* v. *Metropolitan District Ry. Co.*, 19 Ch. D. 508.

(*h*) *Pyne* v. *Kinna*, Ir. R. 11 C. L. 40.

(*i*) *Randall* v. *Lithgow*, 12 Q. B. D. 525.

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Debitum in præsenti solvendum in futuro.

A sum can be attached, notwithstanding that the time for payment has not arrived. As it was expressed by Blackburn, J. (now Lord Blackburn): "It is evident that the legislature had in view both present debt and future debt, *debita in præsenti solvenda in futuro*, for it speaks in the earlier part of the section of "debts owing or accruing" (*k*). Where the precise date on which a sum will be payable does not appear from the terms of the agreement between the debtor and the garnishee, the debt will nevertheless be attachable if it can be said that at the furthest it must become due on or before a certain day (*l*). It would appear, however, that future rent cannot be attached, although rent which has actually become due can be (*m*).

Equitable debts.

As to equitable debts which are attachable, similar rules to those we have referred to as relating to legal debts are applicable. The sum must be an ascertained, and not merely an ascertainable, sum, and therefore garnishee procedure is not applicable for a creditor to obtain a charge over a share of income under a will. Until the sum is actually in the hands of the trustees to be paid over, no one can say that it is a debt which is *debitum in præsenti* (*n*). We have seen that a creditor's real remedy, in case his debtor is the owner of such an interest, is to proceed to equitable execution (*o*). An example of an equitable debt which is attachable, is where a receiver has been ordered to pay to the debtor a definite sum periodically, and has one of the instalments in his hands. This instalment can be attached (*p*). It is submitted that since the Jud. Act

Sum due from receiver.

A legacy.

(*k*) *Tapp* v. *Jones*, L.R. 10 Q.B. 591.

(*l*) *Sparks* v. *Younge*, 8 Ir. C. L. R. 251.

(*m*) *Mitchell* v. *Lee*, L. R. 2 Q. B. 259. See note (*b*) to Ch. Arch. Pr. 14th ed. 929; and specially judgment of Jessel, M. R., in *Chatterton* v. *Watney*, 17 Ch. D. 259.

(*n*) *Webb* v. *Stenton*, 11 Q. B. D. 518. It is submitted that *Nash* v. *Pease*, 47 L. J. Q. B. 766, is of no authority. *Macdonald* v. *Tacquah Gold Mines Co.*, 13 Q. B. D. 535. In *Bates* v. *Bates*, W. N. 1884, 129, however, the order appears to have been made without objection.

(*o*) *Vide supra*, p. 323.

(*p*) This, it is submitted, is the effect of *In re Cowan's Estate*, 14 Ch. D. 638, as modified by *Webb* v. *Stenton*, 11 Q. B. D. 518. Leave would have to be obtained to proceed against him. *Kewney* v. *Atrill*, 34 Ch. D. 345.

a legacy can be garnisheed. Formerly, since it was recoverable at law only when the executor had assented to it, it was attachable only in that event (*q*).

Debt due to executor.

Where an executor is sued and judgment obtained against him by a creditor of the deceased, a sum due to the executor, as such, can be garnisheed (*r*). This is the case, of course, in whatever form the judgment against him may be.

Attaching debt due from executors.

Where it is sought to attach a debt due from executors to the debtor, the order should show on its face that it is directed to them as executors, and not personally (*s*).

Debt affected by trust.

The debt sought to be attached must not be affected by any trust. This point can but rarely arise as between the creditor and the garnishee. Where, however, the debtor when he receives the money would hold it upon trusts other than for his own benefit, it is clear that his creditor cannot attach it. For example, if the debtor is an executor and the debt is due to the estate, his own creditor has no right or claim to attach it. This objection was unsuccessfully raised by a company against which judgment had been signed; the garnishees were in that case a railway company which had guaranteed the payment of interest to the debenture holders of the indebted company (*t*). Where, however, there is a *bonâ fide* suggestion that it is trust money, no order for attachment of the debt should be made, but the amount should be ordered into Court to abide the event of an inquiry whether it is trust money or not (*u*).

Claim by third person.

The cases we have just referred to arose under circumstances where it was to the interest of the judgment debtor or his *cestui que trust* to contend that the sum in question was trust money. The rules do not expressly

(*q*) *Macdonald* v. *Hollister*, 3 W. R. 522.

(*r*) *Burton* v. *Roberts*, 6 H. & N. 93; *Fowler* v. *Roberts*, 2 Giff. 226.

(*s*) Mellish, L. J., in *Stevens* v. *Phelips*, 10 Ch. 417.

(*t*) *Bouch* v. *Sevenoaks, M. & T. Ry. Co.*, L. R. 4 Ex. D. 133.

(*u*) *Roberts* v. *Death*, 8 Q. B. D. 319. See *Westoby* v. *Day*, 2 El. & Bl. 605.

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provide for such a case, but they do provide for the settlement of any such question arising on the suggestion of the garnishee. By rule 5 of O. XLV.:—"Whenever in proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court or a judge may order such third person to appear and state the nature and particulars of his claim upon such debt" (*x*).

O. XLV. r. 5. Order for third person to appear.

O. XLV. r. 6. Proceeding as to claim of third person.

By rule 6:—"After hearing the allegations of any third person under such order, as in rule 5 mentioned, and of any other person whom by the same or any subsequent order the Court or a judge may order to appear, or in case of such third person not appearing when ordered, the Court or judge may order execution to issue to levy the amount due from such garnishee, or any issue or question to be tried or determined according to the preceding rules of this Order, and may bar the claim of such third person, or make such other order as such Court or judge shall think fit, upon such terms in all cases with respect to the lien or charge (if any) of such third person, and to costs, as the Court or judge shall think just and reasonable."

Summary determination of question.

It is of course open to the parties to consent to have any dispute determined by the Court or judge in a summary manner. When this is done the order made comes within sect. 49 of the Judicature Act, 1873, and there is no appeal except by leave of the Court or judge making the order (*y*).

Effect of order under rule 6.

It should be clearly borne in mind that these rules apply after the garnishee order, on the *ex parte* application of the creditor, has been made. The order therefore made under rule 6 may vary or even, in effect, discharge

(*x*) It is too narrow a construction of the rules for the court or judge to refuse to hear a suggestion from any one but the garnishee. See *Roberts* v. *Death*, 8 Q. B. D. 319.

(*y*) *Eade* v. *Winser*, 47 L. J. Q. B. 584.

altogether the original garnishee order, and in such case the costs will usually fall upon the judgment creditor.

Sub-sect. (ii).—*Execution against Pensions and other periodical Payments.*

The subject of this sub-section, though it may be fairly discussed in a chapter devoted to the attachment of debts, is by no means confined to the limits of the particular procedure by means of garnishee orders.

A personal annuity.

The simplest kind of periodical payment is what is known as "an annuity." An annuity is defined as "a yearly payment of a certain sum of money granted to another in fee for life or years, charging the person of the grantor only" (*z*). The grant can, *inter vivos*, only be by deed. We have seen that where such an annuity is charged on land it can be sold under a *fi. fa.*, which is therefore the appropriate method of execution (*a*). There would appear to be no theoretical objection to its being sold under a *fi. fa.*, even where it is not charged upon land, but a mere personal contract, for it is not a chose in action, and can be assigned by deed at common law (*b*). It is submitted, however, that the most direct and satisfactory procedure would be to attach it, the grantor being the garnishee (*c*).

Annuity under a will.

Where an annuity is given by will it does not stand on the same footing as where it has been granted by deed, or where it is a mere payment of a debt by instalments. The executors or trustees of the will are the persons who are by the terms of it bound to pay the annuity. It would appear from the principles we have already dis-

(*z*) Co. Litt. 144 b. The payment must not be made as and by way of interest upon a debt. *Winter* v. *Mouseley*, 2 B. & Ald. 802.

(*a*) *Vide supra*, p. 130.

(*b*) Co. Litt. 144 b, n. (1).

(*c*) By the analogy of *Tapp* v. *Jones* (L. R. 10 Q. B. 591), it should be possible to proceed in this manner. Though, perhaps, where the annuity is in the nature of a pension—*i. e.*, determinable on the life of the grantee—this is not the proper method. *Booth* v. *Trail*, 12 Q. B. D. 8. See Crompton, J., in *Jones* v. *Thompson*, E. B. & E. 63.

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cussed, that in such a case the proper remedy of the execution creditor is to proceed by way of equitable execution (*d*).

Effect of Apportionment Act, 1870.

It is suggested that in all cases of annuities sufficient reference has not been made to the Apportionment Act, 1870 (*e*). It would certainly appear from the terms of that Act that the apportioned part of a periodical payment is, at the date of the application to charge it, a debt accruing within the meaning of the rule. Such apportioned part seems distinctly to be *debitum in præsenti solvendum in futuro*.

Salary and wages.

Where one person has contracted to work for, or to serve another in any capacity for salary (which means ascertained remuneration to be paid at stated intervals), the case is again governed by the principles already discussed. Until the work is done or the service performed there is no debt owing or accruing (*f*). But when the work has been done or service performed, and the instalment of salary is payable, it can be attached (*g*). Provision has been made prohibiting the attachment of the wages of any servant, labourer, or workman (*h*). It is submitted that the Apportionment Act, 1870 (*i*), has no application to salary or wages (*k*).

Pay for public services.

The pay of officers or functionaries in the service of the State is, under special principles, inalienable, and therefore cannot be attached to answer the claims of creditors (*l*). This principle is part of the general law and is entirely

(*d*) *Vide supra*, p. 323. But where a garnishee order had been made attaching an annuity payable under a will, it was held to deprive the beneficiary of that annuity under a clause against assignment of it. *Bates* v. *Bates*, W. N. 1884, 129.

(*e*) 33 & 34 Vict. c. 35.

(*f*) *Hall* v. *Pritchett*, 3 Q. B. D. 215. In an old case the salary of an equerry was held not to be subject to sequestration. *Fenton* v. *Lowther*, 1 Cox, 315.

(*g*) *Gordon* v. *Jennings*, 9 Q. B. D. 45.

(*h*) 33 & 34 Vict. c. 30. And as to seamen's wages, 17 & 18 Vict. c. 104, s. 233.

(*i*) 33 & 34 Vict. c. 35.

(*k*) In some cases an apportioned part might perhaps be recovered on a *quantum meruit*, apart from the Act altogether.

(*l*) The first test is whether or not the pay is alienable. See *Lucas* v. *Harris*, 18 Q. B. D. 127; *Birch* v. *Birch*, 8 P. D. 163, approved.

independent of statutory enactment (*m*), although, as we shall notice, the legislature has expressly prohibited assignment in several cases. The principles are, perhaps, most concisely stated in a judgment of Lord Kenyon, in the leading case on the subject, the question there being whether the half-pay of an officer in the army passed to his creditors under an Insolvent Act. Lord Kenyon, C.J., said: "I am clearly of opinion that this half-pay could not be assigned by the defendant, and, consequently, that the creditors are not entitled to an assignment of it for their benefit. Emoluments of this sort are granted for the dignity of the State, and for the decent support of those persons who are engaged in the service of it. It would, therefore, be highly impolitic to permit them to be assigned; for persons who are liable to be called out in the service of their country, ought not to be taken from a state of poverty. Besides, an officer has no certain interest in his half-pay; for the king may at any time strike him off the list. Indeed, assignments of half-pay have been frequently made in fact, but they cannot be supported in law. It might as well be contended that the salaries of the judges, which are granted to support the dignity of the State and the administration of justice, may be assigned" (*n*).

Half-pay of officer.

The principle applies not only to half-pay, but, of course, *a fortiori*, to full pay (*o*), and has been held to apply to a pension granted to a nobleman to sustain the dignity of the title (*p*). In order for the principle to apply to officers employed in the administration of justice, they must be officers of the Court. A mere clerk, whose duties were to

Full-pay.

(*m*) *Apthorpe* v. *Apthorpe*, 12 P. D. 192.

(*n*) *Flarty* v. *Odlum*, 3 T. R. 681; *Lidderdale* v. *Montrose*, 4 T. R. 248; *Stone* v. *Lidderdale*, 2 Anstr. 533. Judgment of Parke, B., in *Wells* v. *Foster*, 8 M. & W. 149; *Apthorpe* v. *Apthorpe*, 12 P. D. 192.

(*o*) *Barwick* v. *Reade*, 1 H. Bl. 627; *Apthorpe* v. *Apthorpe*, 12 P. D. 192. But an assignment of military pay already in the hands of an officer's agents is good. *Spencer* v. *Cox*, 2 Anstr. 535, note; *Tunstall* v. *Boothby*, 10 Sim. p. 549.

(*p*) Note to *Barwick* v. *Reade*, 1 H. Bl. 627; *Davis* v. *Duke of Marlborough*, 1 Swanst. 74.

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assist the registrars of the Prerogative Court of Canterbury, was decided not to be such an officer, and an assignment of the profits of his office was held valid (*q*). From the judgment in the last-mentioned case, it appears that a clerk of the peace would be such an officer (*r*).

Fellowship of a college.

The principle does not extend to the emoluments of the fellow of a college, there are no duties connected with such a situation or office to make an assignment of the income

Canonry.

contrary to public policy (*s*). Nor are the duties of the holder of a canonry of Windsor such as to render an assignment of the profits thereof void (*t*).

It is suggested that the very nature of payments to servants of the State, for services to be performed, precludes their being assigned; there is no amount recoverable at law, nor any one who can be said to be a debtor to the recipient (*u*).

Besides the principles of the general law which we have referred to, the assignment of pay is prohibited in certain

Military pay and pensions.

cases by statute. Sect. 141 of the Army Act, 1881 (*x*),

(*q*) *Aston* v. *Gwinnell*, 3 Yo. & Jer. 136; *Palmer* v. *Vaughan*, 3 Swanst. 173.

(*r*) 3 Yo. & Jer. 149.

(*s*) *Feistel* v. *King's College, Cambridge*, 10 Beav. 491; and see *Berkely* v. *King's College, Cambridge*, 10 Beav. 602.

(*t*) *Grenfell* v. *Dean of Windsor*, 2 Beav. 544.

(*u*) The payment is usually made by the proper official with whom the money granted by parliament is deposited to defray the charges in the estimates. A warrant from the proper quarter is made out, and thereupon the amount is paid. There is nothing here in the nature of a debt. See *Davis* v. *Duke of Marlborough*, 1 Swanst. 74; *Ex parte Battine*, 4 B. & Ad. 690; *Priddy* v. *Rose*, 3 Mer. 86. Action for money had and received by assignee of half-pay against Paymasters-general held not to lie. *Lidderdale* v. *Montrose*, 4 T. R. 248. But see *Priddy* v. *Rose*, 3 Mer. 86, p. 102. On the grounds mentioned in the text, Lord Lyndhurst refused to appoint a receiver of the salary of a parliamentary counsel to the Treasury. *Cooper* v. *Reilly*, 1 Russ. & My. 560.

(*x*) 44 & 45 Vict. c. 58. The term "military reward" is, by sect. 190, sub-sect. (19), defined to mean any gratuity or annuity for long service or good conduct, and to include any good-conduct pay or pension, and any other military pecuniary reward.

prohibits any charge or agreement to assign or charge any deferred pay or military reward payable to any officer or soldier of any of her Majesty's forces. The assignment of half-pay by officers of the navy is also prohibited (*y*). And with reference to the pay of subordinate officers, seamen in the navy and marines, they are prohibited from charging or assigning their pay, wages or other allowance (*z*).

Alienable pensions.

A pension granted for past services is alienable, unless there is some statutory enactment rendering it inalienable (*a*). The following are examples of pensions which, on the above principle, have been held assignable or seizable in execution:—

A pension to A., and his assigns, payable at the Treasury.(*b*).

An annuity granted to a commissioner of bankrupts (*c*).

Pension and annuity of a retired officer in the East India Company's service (*d*).

Pension of a retired officer in the Indian *navy* (*e*).

Pension as a civil servant in the legal department of the government (*f*).

Pension granted to a County Court judge who had resigned (*g*).

(*y*) 28 & 29 Vict. c. 73, s. 4.

(*z*) 28 & 29 Vict. c. 73, s. 5, extended by 47 & 48 Vict. c. 44, s. 2.

(*a*) The nature of pensions from the Crown is not the same in all cases. Originally, a pension was apparently equivalent to a corody, and was a sum reserved to the Crown on the appointment of bishops and other ecclesiastical functionaries. A pension given by the Crown lay in grant. The method of granting was no doubt by letters patent. See, generally, Co. Lit. 97a, Harg. note (3). For form of grant, Fitz. N. B. 230, 233. A State pension at the present time is payable by the proper State official on a warrant from the proper quarter (as has been mentioned in the text), or under special regulations of the government offices.

(*b*) *M'Carthy* v. *Goold*, 1 Ba. & Be. 387; *Noad* v. *Backhouse*, 2 Y. & C. C. C. 529.

(*c*) Under 5 & 6 Vict. c. 122, s. 58. *Spooner* v. *Payne*, 1 De G. M. & G. 383.

(*d*) *Heald* v. *Hay*, 3 Giff. 467; *Carew* v. *Cooper*, 4 Giff. 619.

(*e*) *Dent* v. *Dent*, L. R. 1 P. & D. 366.

(*f*) *Sansom* v. *Sansom*, 4 P. D. 69.

(*g*) *Willcock* v. *Terrell*, 3 Ex. D. 323.

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Method of execution against pensions.

It is to be noted, that in none of these cases is the process by garnishee order available. If the pension is attachable, the process is by equitable execution. In the cases above referred to, either sequestration or a receiver was resorted to. Where, however, the pension is legally recoverable from the body of persons or the person who should pay it, those instalments which are due can be attached by garnishee; as, for example, the superannuation allowance payable to a retired police constable (*h*).

Inalienable pensions.

Statutes have been passed rendering certain pensions for past services inalienable in the cases following:

Military pensions.

Military pensions payable to any officer or soldier of her Majesty's forces (*i*).

Indian pensions.

Pensions granted by the government on account of past services in India (*k*).

Naval pensions.

Pensions granted to any naval officer, seaman, or marine (*l*).

Retiring incumbent.

Pensions to retiring clerks under the Incumbents' Resignation Act, 1871 (*m*).

One general reason, which we have already given, why pensions to State servants are often unattachable, viz., the form in which the payment of them is made, is applicable in other cases. Where, for example, a superannuation allowance was made to a retired official by resolution of directors of the East India Company, it was held not to be subject to garnishee process (*n*). But where a pension was

Superannuation allowance from East India Company.

(*h*) *Booth* v. *Trail*, 12 Q. B. D. 8.

(*i*) 44 & 45 Vict. c. 58, s. 141; *vide supra*, p. 366. See, under former enactment, *Lloyd* v. *Cheetham*, 3 Giff. 171.

(*k*) Pensions Act, 1871 (Indian Act, No. xxiii), ss. 11, 12. The prohibition against pensions being taken in execution extends, expressly, to India only; but the intention of the Legislature is carried out by sect. 141, mentioned in last note. *Birch* v. *Birch*, 8 P. D. 163; *Lucas* v. *Harris*, 18 Q. B. D. 127.

(*l*) 28 & 29 Vict. c. 73, s. 4. It is, perhaps, questionable whether the pension of a naval surgeon is rendered inalienable by this section. His rank is equal to that of a lieutenant. See *Apthorpe* v. *Apthorpe*, 12 P. D. 192.

(*m*) 34 & 35 Vict. c. 44, s. 10; *Gathercole* v. *Smith*, 17 Ch. D. 1.

(*n*) *Innes* v. *East India Co.*, 17 C. B. 351. Nor did such a pension under the Bankruptcy Act,

granted to a retired judge of a Crown colony, although it is by nature a mere bounty, it is property which passes to the trustee in bankruptcy of his estate (*o*); and taking the test of alienability as deciding whether or not such a pension would be attachable by equitable execution, there appears ground for saying that a receiver would be appointed (*p*).

Form of order by way of equitable execution.

In those cases where a pension or other allowance is attachable by equitable methods and not by garnishee process, attention must be called to what has been stated in a former chapter as to the form the order charging the fund should take (*q*). We have there seen the extent to which the Court has jurisdiction to order payment by the third person in whose hands the money may be (*r*).

Sect. 3.—The Effect of the Garnishee Order.

O. XLV. r. 2. Service and "binding" effect.

We have already, in sect. 1 of this chapter (*s*), discussed the procedure for obtaining a garnishee order and subsequent proceedings thereon, and have also referred to rule 2 of O. XLV. by which—"Service of an order that debts, due or accruing to a debtor liable under a judgment or order, shall be attached, or notice thereof to the garnishee, in such manner as the Court or a judge shall direct, shall bind such debts in his hands."

The binding of the debt dates from the service and not from the order being made (*t*).

Effect of the rule.

The effect of the above rule is stated to be to bind the debt attached, and to prevent the creditor from receiving

1869, pass to the trustee in bankruptcy of the recipient. *Ex parte Hawker*, 7 Ch. 214.

(*o*) *Ex parte Huggins*, 21 Ch. D. 85.

(*p*) See judgment of Jessel, M. R., in *Ex parte Huggins*, pp. 90, 91.

(*q*) *Vide supra*, p. 289.

(*r*) *Crispin* v. *Cumano*, L. R. 1 P. & D. 622; *Willcock* v. *Terrell*, 3 Ex. D. 323; *Sansom* v. *Sansom*, 4 P. D. 69.

(*s*) *Vide supra*, p. 350.

(*t*) *Re Stanhope Silkstone Collieries Co.*, 11 Ch. D. 160; *Hamer* v. *Giles*, 11 Ch. D. 942.

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it. "There is nothing in the terms of the general order to affect any security for the debt; it only takes away the right of the judgment debtor to receive the money, and gives the judgment creditor a right to receive it" (*u*). The garnishee is therefore discharged from paying to the debtor so much of the debt as is actually paid to the creditor under the attachment.

O. XLV. r. 7. Discharge of garnishee.

Express provision is made in respect of this by r. 7 of O. XLV., whereby—"Payment made by, or execution levied upon, the garnishee under any such proceeding as aforesaid, shall be a valid discharge to him as against the debtor liable under a judgment or order to the amount paid or levied, although such proceeding may be set aside or the judgment or order reversed" (*x*).

This does not authorise the garnishee to make an arrangement for payment to the creditor immediately the order is served on him, the order must be made absolute before he can justify under it a payment as having been made by him (*y*). This appears to be the true construction of the words in the rule "under any such proceeding as aforesaid." The authorities on this point have, however, gone so far as to exonerate a garnishee who has, under threat of execution or actual execution, paid his debt, although he has, after the order for execution has been made against him, received notice of the debtor's bankruptcy (*z*).

(*u*) Judgment of Cotton, L. J., in *Chatterton* v. *Watney*, 17 Ch. D. 259. It follows, therefore, that a charging order does not operate as an assignment of the debt itself. But where the debt garnisheed is a judgment debt, the general order operates as a stay of execution upon the judgment. *Re Connan, Ex parte Hyde*, 20 Q. B. D. 690.

(*x*) See *Re Smith, Ex parte Brown*, 20 Q. B. D. 321. Possibly on principle, and apart from this rule, where the garnishee has by due process of law been *compelled* to pay, he might set up such payment against the person to whom the debt from him was due. *Mayor of London* v. *Joint Stock Bank*, 6 Ap. Ca. 393. See *Wetter* v. *Rucker*, 4 Moo. 172.

(*y*) *Turner* v. *Jones*, 1 H. & N. 878, where on service the garnishee had given to the creditor a promissory note, and no further proceedings were taken. See also *Lockwood* v. *Nash*, 18 C. B. 536.

(*z*) *Wood* v. *Dunn*, L. R. 2 Q. B. 73; *Turnbull* v. *Robertson*, 47 L. J. C. P. 294.

Where the garnishee pays the amount of the debt into Court, either voluntarily, as he is at liberty to do, or under an order made against him, such payment is equivalent to payment to the creditor under the above rule, and discharges him (*a*).

Payment into Court a discharge.

If the garnishee alleges against the debtor a set-off in respect of the debt attempted to be garnisheed, it can be gone into under rule 3 above referred to (*b*). This is clear as regards a set-off, strictly so-called, and under the statute of set-off (*c*), because a set-off is a defence in bar. It has apparently yet to be decided to what extent a garnishee can raise against a creditor attaching the debt a counter-claim under sect. 24, sub-s. (3) of the Jud. Act, 1873, and O. XIX. r. 3 (*d*). There is no place in garnishee proceedings for the discussion of cross claims between the garnishee and the judgment creditor (*e*).

Set-off alleged.

Counter-claim.

The meaning of the words "shall bind such debts in his hands" must be now discussed in relation to the claims of other creditors and third persons. The debt must be "in his hands" to be attachable at all, and therefore where a garnishee order has been obtained against executors of an estate in chancery, and they have paid the estate into Court, effect will not be given to the order by payment out to the creditor (*f*). The effect of the order being such as we have stated, no authority is required for the proposition that, as between competing creditors having garnishee orders, the first to serve his order is entitled to priority.

"Shall bind such debts in his hands."

With regard to the claims of third parties other than competing creditors, we have, in sect. 2, sub-s. (i), *supra*, referred to the procedure to be adopted in order to settle

Claims of third parties.

(*a*) *Culverhouse* v. *Wickens*, L. R. 3 C. P. 295.

(*b*) *Vide supra*, p. 353.

(*c*) 2 Geo. II. c. 22, s. 13; and 8 Geo. II. c. 24, s. 4.

(*d*) A counter-claim has not the effect of a defence, but of a cross-action.

(*e*) *Sampson* v. *Seaton, &c. Ry. Co.*, L. R. 10 Q. B. 28.

(*f*) *Stevens* v. *Phelips*, 10 Ch. 417.

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their claims. The main principle applicable in this, as in all other cases of execution, is that the execution creditor can get no further right than the debtor could honestly give him. The debt, therefore, is attached, subject to all claims of whatever nature in respect to it. Bearing this in mind, it is therefore an elementary proposition that a debt which has at the date of service already been assigned to a third person cannot be attached at all (*g*). Where the claim of the third person is a mere equitable charge of which the creditor had no notice, it will nevertheless rank in priority to his garnishee order (*h*). Again, where the sum endeavoured to be garnisheed is the purchase-money of land payable under a contract, it is doubtful whether it can be attached, for this might "deprive the purchasers of their right to withhold payment of their purchase-money until they get their conveyance" (*i*).

Purchase-money of land.

Effect of attachment of rent.

The mere fact, however, that by the attachment of the debts the debtor may be deprived of a collateral means of recovering it, will not prevent the order being made, for example, against a tenant, though thereby the landlord (debtor) is deprived of his remedy by distress (*k*). Several cases have arisen upon the lien of solicitors for costs over a judgment debt recovered by their instrumentality. Solicitors in such cases have, apart from the statute, a lien over the fund, and such lien cannot be affected by an assignment of the fund by the client (*l*). It is true that the solicitor can obtain a charging order under 23 & 24 Vict. c. 127, s. 28, but his not having done so until subsequently to the service of the garnishee order, will not affect his priority. The creditor is not a purchaser, and the debtor

Solicitor's lien over sum recovered.

(*g*) See *Webster* v. *Webster*, 31 Beav. 393.

(*h*) *Ex parte Whitehouse*, 32 Ch. D. 512; *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536, p. 546.

(*i*) *Howell* v. *Metropolitan, &c., Ry. Co.*, 19 Ch. D. p. 515. In connection with this point, consider *Sparks* v. *Younge*, 8 Ir. C. L. R. 251.

(*k*) *Mitchell* v. *Lee*, L. R. 2 Q. B. 259.

(*l*) *Haymes* v. *Cooper*, 33 Beav. 431; *Hamer* v. *Giles*, 11 Ch. D. 942; *Dallow* v. *Garrold*, 14 Q. B. D. 543.

could not honestly give any person a charge ousting the solicitor (*m*).

Bankruptcy of judgment debtor.

The effect of the bankruptcy of the judgment debtor upon garnishee proceedings is regulated by sect. 45 of the Bankruptcy Act, 1883, which has been set out in a former chapter (*n*). It will be observed that by that section the creditor is not entitled to retain the benefit of the attachment unless the execution is completed by the receipt of the debt. The act means what it says, that the attachment must be completed by *receipt* of the debt, and therefore a payment of the sum attached into Court to abide the result of an issue between the creditor and a third person, is of no avail against the trustee in bankruptcy (*o*). The position of the creditor who has obtained a garnishee order is changed materially for the worse by the new enactment, for, under the Act of 1869, the question was always whether he had, by obtaining and serving the garnishee order, become a secured creditor (*p*).

Sect. 4.—Attachment Book and Costs.

Debt attachment book.

By O. XLV. r. 8, "There shall be kept by the proper officer a debt attachment book, and in such book entries shall be made of the attachment and proceedings thereon,

(*m*) *Dallow* v. *Garrold*, 14 Q.B.D. 543. The decision in this case obviates the necessity of more than a reference to the prior decisions. *Hough* v. *Edwards*, 1 H. & N. 171; *Sympson* v. *Prothero*, 26 L. J. Ch. 671; *Birchall* v. *Pugin*, L. R. 10 C. P. 397; *Shippey* v. *Grey*, 49 L. J. Q. B. 524. If the creditor has, with notice of the lien, been paid by the garnishee, such creditor will be ordered to refund to the solicitor. *Eisdell* v. *Coningham*, 28 L. J. Ex. 213.

(*n*) *Vide supra*, p. 152.

(*o*) *Butler* v. *Wearing*, 17 Q. B. D. 182.

(*p*) *Emanuel* v. *Bridger*, L. R. 9 Q. B. 286; *Lowe* v. *Blakemore*, L. R. 10 Q. B. 485; *Ex parte Joselyne*, 8 Ch. D. 327; *Re Stanhope Silkstone Collieries Co.*, 11 Ch. D. 160. But the title of the trustee in bankruptcy might by relation back oust the title of the creditor to the debt garnisheed. *Ex parte Pillers*, 17 Ch. D. 653.

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with names, dates, and statements of the amount recovered, and otherwise; and copies of any entries made therein may be taken by any person, upon application to the proper officer."

Costs.

By O. XLV. r. 9, "The costs of any application for an attachment of debts, and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court or a judge."

Position of creditor as to costs.

The costs of garnishee proceedings are frequently of considerable importance, because, if the proceedings are abortive, the creditor has to bear them. He stands the risk of there being any other claimant to the debt. Perhaps, on bankruptcy of the debtor, before receipt of the debt by the creditor, he would be admitted to prove for the amount charged by his order, and the costs. Where the creditor fails in obtaining or upholding an order he cannot, of course, get the costs from the debtor. Where he succeeds, he adds his costs to his judgment debt, and they are payable out of the sum garnisheed (*q*). If the garnishee disputes his liability and is defeated, he will have to pay the costs (*r*). If the garnishee does not dispute his liability, he is entitled to a small sum for his costs.

(*q*) *Simmons* v. *Storer*, 14 Ch. D. 154.

(*r*) *Johnson* v. *Diamond*, 11 Ex. 431.

CHAPTER IV.

EXECUTION AGAINST MARRIED WOMEN.

Husband's liability.

We have already, in its proper place, sketched in outline the extent to which a husband is entitled or liable to execution upon a judgment or order for or against a wife (*a*). We shall here refer again to his liability, where necessary, in greater detail.

Arrangement of this chapter.

In view of the legislation on the subject, we propose to divide this chapter into three sections :—

Sect. 1. The law relating to execution against married women and their property prior to the 9th August, 1870.

Sect. 2. The law relating to execution against married women and their property on and after the 9th August, 1870, and prior to 1st January, 1883.

Sect. 3. The law relating to execution against married women and their property after 31st December, 1882.

Sect. 1.—The Law relating to Execution against Married Women prior to the 9th August, 1870.

What judgments could be signed against a married woman at law.

Before the 9th August, 1870, the date of the passing and coming into operation of the Married Women's Property Act, 1870 (*b*), no action at law could be sustained, and, therefore, no judgment signed, against a married woman without joining her husband (*c*). But, although

(*a*) *Vide supra*, p. 25.

(*b*) 33 & 34 Vict. c. 93.

(*c*) If an action were brought against a married woman as if she were a *feme sole*, and she neglected to plead coverture, so that judgment was signed against her, her husband and she could bring a writ

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no action could be properly brought against a married woman alone, she and her husband jointly might well, under certain circumstances, be sued, and judgment signed against them accordingly (*d*). Wherever such judgment was signed, execution following it was good, so that, for example, a *ca. sa.* could be, and was, regularly issued only when against both husband and wife. Both could be taken under this form of execution (*e*). As to execution against property, the husband was alone deemed capable of owning or holding it, and no question (at law) could arise as to execution against the property of a married woman, for it was non-existent (*f*). Where judgment in the usual form was signed against husband and wife by default, she did not become personally liable so as to render property settled to her seperate use with a restraint on anticipation available (*g*).

Liability of married woman in equity.

In equity the *status* of a married woman, with respect to property, was regarded from a different standpoint. The *jus maritus* was recognized where there appeared

of error. *Hayward* v. *Williams*, 1 Roll. Abr. 748, pl. 18; *Haydon* v. *Miller*, 2 Roll. Rep. 53. If, however, pending an action against a *feme sole*, she married, and then judgment was signed against her, she might be arrested regularly on a *ca. sa.* *Haydon* v. *Miller*, *ubi supra*; *Doyley* v. *White*, Cro. Jac. 323; *Scott* v. *Morley*, 20 Q. B. D. 120, judgment of Bowen, L. J., at p. 127. The report of this last-mentioned case indicates the authorities which show under what circumstances the Court would discharge the married woman from custody.

(*d*) The cases in which such a judgment could, at the period we are discussing, have been obtained, may be said to have been of two classes: — (a) ante-nuptial debts, contracts and torts of the wife: judgment debts recovered against the wife *dum sola* could be enforced against the husband by *sci. fa.* (*Vide supra*, p. 25.) (b) Post-nuptial torts of the wife, the wife being under an absolute incapacity to contract, there could be no post-nuptial contracts: on contracts for necessaries, the husband was, of course, liable alone, and the judgment was not against him and his wife jointly.

(*e*) *Vide supra*, note (*e*), preceding page.

(*f*) Even the wife's paraphernalia was, for the purposes of execution, taken as belonging to the husband. 2 Rop. Husb. & W. 142.

(*g*) *Chapman* v. *Biggs*, 11 Q. B. D. 27.

nothing to exclude it, as fully as it was at law. Thus, the husband's legal right to property was always unquestioned, and where there was no indication of an intention to exclude his ownership, the same result followed with respect to equitable property. But, under the exclusive jurisdiction exercised by the Court of Chancery, all property which belonged to the wife "for her separate use" was protected and kept for her enjoyment against, and notwithstanding the claims of the husband or his creditors. It would be presumptious, if not impossible, to attempt to describe, within the limits assigned to this work, the different events upon which property was held to be "for the separate use" of the wife. It will suffice for us to point out that with respect to it, she was regarded in equity almost entirely as a single woman. She could dispose of it, enter into *an engagement* so as to bind it, and enjoy it in whatever manner she pleased. On to this anomaly was engrafted another—that her power of disposition of property settled to her separate use, could be limited, almost absolutely, by what is sufficiently described as "the restraint on anticipation."

"For her separate use."

The restraint on anticipation.

Concurrently with the development of the theory of property to the separate use of the wife, and her capacity to hold or own it, there grew up a corresponding theory of liability with respect to it (*h*). This liability was recognized only in equity, and enforceable only by its decrees. We are not concerned here to explain in what cases this remedy in equity could be obtained by a person claiming

Liability of property "to the separate use."

(*h*) A learned author suggests, "that the separate estate may be regarded as a sort of artificial person created by Courts of equity, and represented by the beneficial owner as an agent with full powers, somewhat in the same way as a corporation sole is represented by the person constituting it for the time being. As a contract made by the agent of a corporation in his employment can bind nothing but the corporate property, the engagement of a married woman can bind nothing but her separate estate. This way of looking at it is no doubt artificial, but may possibly be found to assist in the right comprehension of the doctrine." Poll. Contr. 3rd ed. p. 91.

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to be a creditor of the wife. Such an explanation would involve us in questions far beyond our scope. But we are most interested in the form that remedy took, for the reason that upon it was based the particular kind of execution which was available.

Remedy of person claiming decree in respect of property to separate use.

When a person claimed to be a creditor of a married woman, in the sense that he was entitled to be paid a sum of money due to him out of estate settled to her separate use, his method of proceeding was by suit in equity, asking for a declaration that such estate was chargeable with the sum claimed, and for discovery of what such estate consisted.

When trustees necessary parties.

Besides the married woman, the trustees were also interested in the property which they held to her separate use. Such trustees, therefore, were proper, and, in many cases, necessary parties to the suit (*i*). If they were not made parties, a general declaration of charge could be obtained, which would of course affect the married woman herself, and all claiming under her, but would be entirely without prejudice to the rights of the trustees (*k*). The husband was also a proper, and, in most cases, an essential party to the suit (*l*); but the purpose of his being joined was that a decision might be obtained, on the question, whether the property alleged to be estate settled to the separate use was or was not of that description (*m*). It

When husband necessary party.

(*i*) They were essential in cases where sufficient discovery of what the estate consisted could not be obtained without their presence. Under the present practice they should in all cases be made parties whenever it is sought to make the declaration of charge effectual, by getting an order against them to pay, such an order could not, of course, be made against them in their absence. *Collett* v. *Dickenson*, 11 Ch. D. 687. This is important in connection with the statement that where the order is made against the wife only, she is not necessarily guilty of a contempt in not observing it. *Vide infra*, p. 380.

(*k*) Form of order in *Picard* v. *Hine*, 5 Ch. p. 278; *Davies* v. *Jenkins*, 6 Ch. D. 728; *Collett* v. *Dickenson*, 11 Ch. D. 687; *Flower* v. *Buller*, 15 Ch. D. 665; *In re Peace & Waller*, 24 Ch. D. 405.

(*l*) *Hancocks* v. *Lablache*, 3 C. P. D. 197; *Atwood* v. *Chichester*, 3 Q. B. D. 722.

(*m*) *Collett* v. *Dickenson*, 11 Ch. D.

was possible, therefore, to bring and pursue an action against the wife without joining the husband, *e. g.*, in cases where it was quite clear as against him, by admission or otherwise, that the estate sought to be charged was settled to her separate use.

Form of decree in suit to charge property "to separate use."

Where the plaintiff substantiated his right to an order against the interest of the married woman, it took the form of a declaration of a general charge (*n*), and inquiries as to what the separate estate consisted of. It will be better to set forth an ordinary form of this order in full:—"Declare that the separate estate of the defendant, M. T."—(*the married woman*)—"which was on the day of [*or*, which is now (*o*)] vested in her, or in any other person in trust for her, was chargeable with the payment of the balance remaining due to the plaintiffs, as the holders of the bill of exchange, for £ , in the pleadings mentioned, for principal, interest, and expenses, as therein mentioned; And let the said separate estate of the said defendant stand charged with the payment to the plaintiff of such balance accordingly. And let the following accounts, &c.: 1. An account of what is due to the plaintiffs, as holders of the said bill of exchange, for, &c.: 2. An inquiry of what the separate estate of the said M. T. consisted on the said day of [and on the date of this decree (*o*)], and in whom it was vested at that date (*p*),

687. And the plaintiff must pay his costs and add them to his debt. *Ib.* For a case where, although the question of separate use was raised, the husband, claiming against the separate use, was party to the action, but his wife was not, *Williams* v. *Mercier*, 10 Ap. Ca. 1.

(*n*) Such a declaration was held only to bind such separate estate as, at the time of entering into the engagement, she was entitled to. She could not bind after-acquired separate property; hence the form of the decree in the text. *Pike* v. *Fitzgibbon*, 17 Ch. D. 454.

(*o*) This was doubtful at the date when this order was a usual precedent, notwithstanding it was the form of order adopted in *Picard* v. *Hine*, 5 Ch. 274. See last note. See now sect. 1, sub-sect. (4) Married Women's Property Act, 1882.

(*p*) This is a decree made in the absence of the trustees.

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and whether any and what disposition thereof, or dealing therewith, by the said defendant M. T. has been made since the aforesaid dates" (*r*).

No personal order against the married woman.

The prominent feature in this and all other decrees or orders against estate *settled to the separate use*, is that there is no personal order against the married woman for payment of the sum due. A most important consequence of this, so far as we are concerned, is, that in case she does not, out of the money she receives, pay over the sum due, she is not liable for contempt. Under such a form of order, therefore, the remedies to which we have referred in Book II., *supra*, whose essence is, that the person against whom they are used should be in contempt, are not available. It is clear, also, that to enforce the order no writ of *fi. fa.* or *elegit* could issue against the property subject to it. These writs apply only to legal property, and of this, at the period to which we are referring, she could have none (*s*).

Execution on decree was equitable execution.

The proper process for enforcing a decree or order charging estate settled to the separate use was, and, where such order is the appropriate remedy, is, by way of equitable execution. Before the coming into operation of the Judicature Acts, proceedings would have had to be taken under the decree for putting in force the charge given by it.

A receiver.

Since the Acts, a receiver may be, and usually is, at once appointed, who intercepts what would otherwise be coming to the married woman from the trustees (*t*). The order should itself provide for the appointment of a receiver, but

(*r*) Seton on Decrees, 689; *Picard* v. *Hine*, L. R. 5 Ch. 274; *Pike* v. *Fitzgibbon*, 14 Ch. D. 837. As has been mentioned in a former note, note (*i*), p. 378, *supra*, where the trustees are parties to the action, the decree may take a form directing them to pay over to the creditor.

(*s*) The statement here is, perhaps, not wholly correct, for in a simple case of land settled to the wife's separate use, it might be that an *elegit* would be issuable. Her interest might be said to fall within the terms of the 10th section of the Statute of Frauds, and sect. 11 of 1 & 2 Vict. c. 112.

(*t*) *Re Peace & Waller*, 24 Ch. D. 405.

if it does not the appointment may be made subsequently on motion or summons, and, it is submitted, *ex parte*.

How Married Women's Property Acts affect property to the separate use.

The legislation which is discussed in the two remaining sections of this chapter only indirectly affects the position of a married woman with respect to property settled to her separate use. She still continues to have an equitable interest only in such property; and an order in the form we have set forth, though not, perhaps, usual, is still available to charge it. Where, therefore, the claim of the creditor is against property of the wife which is hers by virtue of a settlement under which there are trustees, or which is hers under any arrangement whereby she has not the legal estate, an action claiming a declaration and inquiries to the effect above mentioned would lie. The advisability of pursuing this course will appear from the discussion in sect. 3, *infra*. The execution following upon the order is equitable execution.

Summary of section.

Our very slight sketch in this section of the mode in which property settled to the separate use was, and may still be, rendered available, will have attained its end if we have made clear two leading points:—

(a) That a wife was not, and is not now, under the usual form of order charging property settled to the separate use, personally liable, so far as payment is concerned, to perform the order; the remedy has always been against that property, and not against her;

(b) And that the particular method of execution employed upon such an order was, and is, the equitable method of a receiver, and, where necessary, a distinct proceeding or action.

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Sect. 2.—The Law relating to Execution against Married Women and their Property on and after the 9th August, 1870, and prior to 1st January, 1883.

General effect of Married Women's Property Act, 1870.

By the Married Women's Property Act, 1870 (*u*), a considerable extension was made of the rights of married women. Her "wages and earnings" (and a wide signification was given to the term), acquired or gained by her after the passing of the Act, were constituted property held and settled to her separate use (*x*).

She was further empowered to hold many kinds of property, deposits in savings' banks, stock in the funds, shares in joint stock companies, and in friendly or benefit societies, apart from her husband.

And, with reference to any woman marrying after the passing of the Act, personal property to which, during the marriage, she might become entitled as next of kin, or one of the next of kin, of an intestate, or any sum of money not exceeding two hundred pounds, under any deed or will (*y*), and any freehold or customaryhold property descending upon her (*z*), were also constituted property to belong to her for her separate use.

Effect of Act on wife's liability.

There was nothing in the Act which rendered the personal liability of the wife different from what it had been before its passing. Of course, the greater facilities which were given her of acquiring property of her own rendered executions against it much more frequent, and the subject, therefore, more important.

Effect of Act on husband's liability for ante-nuptial matters.

This statute completely abolished the liability of a husband, marrying after the date of the Act, for the ante-nuptial debts of his wife; but, as we have seen, this liability was, to some extent, resuscitated by the Married Women's Property Act of 1874 (*a*). We have already referred to

(*u*) 33 & 34 Vict. c. 93.
(*x*) 33 & 34 Vict. c. 93, s. 1.
(*y*) Sect. 7.
(*z*) Sect. 8.
(*a*) 37 & 38 Vict. c. 50.

the extent of that liability, but it remains to mention that by the 4th section—"When a husband and wife are sued jointly, if, by confession or otherwise, it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment, to the extent of the amount for which the husband is liable, shall be a joint judgment against the husband and wife, and as to the residue, if any, of such debt or damages, the judgment shall be a separate judgment against the wife."

Effect on this, of Act of 1874.

The short effect with reference to execution of the legislation of 1870 and 1874, may be said to have been, that it created a limited capacity of trading in the wife, and rendered available for her *general engagements* many kinds of property which before had belonged absolutely to the husband. The form of judgment against her was not altered by the Act; it remained merely a declaration of charge against the property to her separate use (*b*).

Short effect of legislation of 1870 and 1874.

Sect. 3.—The Law relating to Execution against Married Women and their Property after 31st December, 1882.

By the Married Women's Property Act, 1882 (*c*), an entire change was made in the *status* of a married woman so far as concerns both her legal and equitable capacity to own property, and her rights and duties incidental thereto. This directly affects our subject, and it has been thought advisable to reproduce the sections of the Act necessary to its explanation.

Effect of Married Women's Property Act, 1882.

By sect. 1, sub-sect. (1) of the Act, "A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property, in the same

Sect. 1, sub-sect. (1), capacity given to married woman to own property.

(*b*) *Durrant* v. *Ricketts*, 8 Q. B. D. 177.

(*c*) 45 & 46 Vict. c. 75. The Act repealed the two former enactments above referred to. Sect. 22.

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manner as if she were a *feme sole*, without the intervention of any trustee."

Effect of sub-section on property then existing.

This sub-section, creating as it does in a married woman a new capacity altogether, has most important effects upon the particular kind of execution which is available against her property.

In the first place, the sub-section is an enabling one. It is submitted that according to its clear construction it has no effect upon the *status quo* of property existing at the date of the coming into operation of the Act. Where, therefore, property was then settled to the separate use of the married woman, it still remained so after the Act was passed. The legal estate continued in the trustees, or, if there were no trustees specially appointed, in the husband as sole trustee for her (*d*). The same was the case, of course, in respect of personal property, whether consisting of leaseholds, goods and chattels, or stock (*e*).

Effect of sub-section on subsequently-acquired property.

With respect to all property acquired by any married woman after the Act, or belonging to any woman married after the Act, it becomes or remains hers as if she were a *feme sole* (*f*). The effect (if any) of this enactment upon her relationship to property settled to her separate use where trustees are appointed, has not been discussed, but it is clear that where there are no such trustees, the whole interest in such property, both legal and equitable, is vested in her (*g*). With this slight explanation of the effect of

(*d*) *Bennet* v. *Davis*, 2 P. Wms. 316.

(*e*) *Newlands* v. *Paynter*, 10 Sim. 377.

(*f*) This must be taken with the explanation afforded by sect. 5 of the Act, whereby "Every woman married *before the commencement* of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid, as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money and property so gained or acquired by her as aforesaid." As to this, see *Baynton* v. *Collins*, 27 Ch. D. 604; *Re Thompson & Curzon*, 29 Ch. D. 177.

(*g*) It is submitted that the words in the sub-section, "as her separate property," have a mean-

the Act upon property, we shall, after understanding the manner in which judgments and orders are made against married women under it, be in a position to explain the effect upon the law and practice of execution.

Sect. 1, sub-sect. (2), capacity and liability of married women as to contracts and torts.

By sect. 1, sub-sect. (2), "A married woman shall be capable of entering into and rendering herself liable in respect of, and to the extent of, her separate property on any contract (*h*), and of suing and being sued either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her, and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

Position of the husband under this sub-section.

It may assist in the comprehension of this enactment if we attempt to ascertain the position of a husband in respect to it. This section does not add in any way to his liability; there is nothing in it which gives new or additional remedies against him. It does not decrease or affect his liability with respect to contracts entered into during the coverture. Those contracts upon which he could have been sued at law he can still be sued upon, irrespective of and notwithstanding the Act. For example, his liability for necessaries supplied to his wife remains the same. His position with reference to actions for torts of his wife committed during coverture is different. The Act does not abolish his liability for such torts, and he can still be sued jointly with

ing distinct from "property settled to her separate use." The words "separate property" do not include a power of appointment. *Ex parte Gilchrist, Re Armstrong*, 17 Q. B. D. 521.

(*h*) "In my opinion, according to the true construction of the Act, the contract which is to bind separate property must be entered into at a time when the married woman has existing separate property." Pearson, J., *Re Shakespear*, 30 Ch. D. p. 171.

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his wife for them (*i*); but the wife can also, under this sub-section, sue or be sued alone, without his being joined with her as plaintiff or defendant (*k*). This explanation, coupled with what has been already stated on the subject of his liability, will, it is submitted, make his position clear.

The judgment signed against the married woman.

The judgment which can be signed against the married woman in pursuance of the sub-section is not an ordinary judgment. Nor has it only the effect which a decree in equity had in declaring a charge over the property settled to her separate use. It has been suggested by the Court of Appeal in a recent case that the form of judgment against a married woman under s. 1 (2) of the Act should be as follows:—

Form.

"It is adjudged that the plaintiff do recover £ and costs [to be taxed] against the defendant [*the married woman*], such sum and costs to be payable out of her separate property as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant [*the married woman*] not subject to any restriction against anticipation, unless by reason of s. 19 of the Married Women's Property Act, 1882, the property shall be liable to execution notwithstanding such restriction" (*l*).

Effect of this judgment as to execution on it.

In all ordinary cases, at all events, this form of judgment is available; but it needs hardly to be said, that it is not the only form which an order can take for payment either against a married woman or her property (*m*). The effect of this judgment may be expressed shortly in the words of Lord Esher, M.R.:—"The damages recoverable

(*i*) *Seroka* v. *Kattenburg*, 17 Q. B. D. 177. The Act "does not affect the case of a wrongful act committed by a woman during marriage." Brett, J., in *Scott* v. *Morley*, 20 Q. B. D. p. 125. See Macq. Husb. & W. 3rd ed. p. 92. The concluding words of the section—"and not otherwise"—relate only to cases of judgments recovered against the married woman alone.

(*k*) *Weldon* v. *Winslow*, 13 Q. B. D. 784.

(*l*) *Scott* v. *Morley*, 20 Q. B. D. 120. See *Perks* v. *Mylrea*, W. N. 1884, 64; *Bursill* v. *Tanner*, 13 Q. B. D. 691.

(*m*) *Vide infra*, p. 387 *et seq.*

are not to be payable by the married woman, they are to be payable out of her separate property" (*n*). Upon this judgment all the usual methods of execution can be taken. Where separate property is hers without the intervention of a trustee, she has the legal estate or interest, and the ordinary writs of *fi. fa.* and *elegit* are as available as if she were unmarried. But where a trustee intervenes, equitable methods of execution must be resorted to. The practitioner should, therefore, always ascertain the nature of the property which the married woman has, and by that be guided as to the form of the execution he issues. Although this judgment is specially stated to be appropriate to cases under s. 1, sub-s. (2), of the Act, it is submitted that it has, with reference to property settled to the separate use, practically the same effect as the old decree or order declaring a charge. The same methods of execution with respect to such property would appear to be available under both forms.

Subsequently-acquired separate property liable for contract.

By s. 1, sub-s. (4), "Every contract entered into by a married woman, with respect to and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire."

Is separate property acquired after judgment liable under it?

It is clear, therefore, that all separate property unrestrained from anticipation which a married woman has at the date of the judgment is available to satisfy it (*o*). It may, perhaps, be questioned whether property which she acquires after the date of the judgment is so available (*p*). The declaration of charge contained in a decree made before the Act bound only such property as then was found by the inquiries to be settled to the wife's separate

(*n*) And, therefore, a married woman cannot be committed to prison under sect. 5, Debtors Act, 1869. *Scott* v. *Morley*, 20 Q. B. D. 120, deciding the doubt expressed in *Meager* v. *Pellew*, 14 Q. B. D. 973.

(*o*) Field, J., in *Bursill* v. *Tanner*, 13 Q. B. D. 691; *Re Shakespear*, 30 Ch. D. 169.

(*p*) So far as the minute of the order goes in *Conolan* v. *Leyland*, 27 Ch. D. 632, it appears to be in favour of its being available.

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use. From the nature of the case it was impossible that after-acquired property should under such an order be charged, apart altogether from the principle as to general engagements, to which we have referred in a former note (*q*). If, now, separate property acquired after the date of the judgment were subject to execution, it would seem to follow that the judgment, when it is made, has a personal effect beyond binding her separate property. It is submitted that after judgment sub-s. (4), above quoted, has no application, for the reason that the contract is by the judgment merged and gone.

Sect. 19. Restraint on anticipation.

The Act expressly provides that its enactments shall not interfere with any settlement existing at the date of its passing or subsequently made, so that it is still possible to settle property to the separate use of a married woman, and to restrain her anticipating it. No such restriction, if imposed by settlement on her own property, is good against prior creditors (*r*).

The restraint on anticipation prevents, except in the case last mentioned, any creditor from taking in execution the property settled; for if he could so take it, a judgment would be an anticipation (*s*). The form of judgment given above is on this point clearly expressed, and needs no explanation.

Liability of husband for ante-nuptial contracts and torts.

Special provision is by the Act made regulating the liability of a husband for the ante-nuptial contracts and torts of his wife. It appears to follow from the language of sect. 1, sub-sect. (2), that a married woman can be sued alone, and without her husband being joined, in respect even of ante-nuptial matters. At the same time it is in the option of the creditor or person injured to sue both husband and wife. When the creditor or person injured takes that course, the effect of his so doing is stated in sects. 14 and 15 of the Act.

(*q*) *Vide supra*, p. 379 *et seq.*

(*r*) Sect. 19.

(*s*) See judgment of James, L. J., in *Pike* v. *Fitzgibbon*, 17 Ch. D. p. 459.

Sect. 14.

By sect. 14, "A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid, but he shall not be liable for the same any further or otherwise (*t*); and any Court in which a husband shall be sued for such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid."

Mode of suing both husband and wife, and form of judgment.

By sect. 15, "A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong), contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, whether wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him, or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife, if jointly sued with him; and in any

(*t*) The comparison between the separate estate and a corporation sole, to which attention has been drawn in a former note ((*h*), p. 377, *supra*), is well illustrated by the terms of this section.

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such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment, to the extent of the amount for which the husband is liable, shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only."

Effect of two last sections.

This last section clearly indicates the form which the judgment is to take in cases where it is signed against the husband and wife jointly. As to the husband, it is to be an ordinary judgment for the amount for which he is found to be liable; and as to the wife, it is to be in the form already given. Execution upon such a judgment, it is submitted, presents no difficulty. The writ of *fi. fa.* or *elegit*, when available, must be issued jointly against both, in order to comply with the judgment. Where equitable execution is sought, the order appointing the receiver must be precise as to the amount to be taken from the property, in respect of which he is appointed, according as it belongs to the husband or the wife.

Liability of married woman trustee.

It remains to mention that the Act has further altered the law relating to a married woman's position when she is a trustee.

Sect. 24.

By sect. 24, "The word 'contract' in the Act shall include the acceptance of any trust, or of the office of executrix or administratrix; and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or *devastavit* committed by any married woman, being a trustee or executrix or administratrix, either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration" (*u*).

(*u*) A husband, therefore, now incurs no responsibility by reason of his wife accepting the office of administratrix. *In the goods of Harriet Ayres*, 8 P. D. 168.

Effect of section.

Where a married woman acts in a fiduciary capacity, her liability would appear to be limited by this section to the extent of her separate property. There are no decisions to indicate the full meaning of the enactment, and our few remarks on this part of the subject are made with diffidence.

Order obtainable against married woman trustee.

We have seen that the order against a defaulting trustee is a personal order, of which disobedience is a contempt, and (historically at all events) the primary remedy is by attachment to answer that contempt (*x*).

The proper order against a married woman who is a defaulting trustee would, therefore, appear to be a personal order. Her liability for her contempt seems to be limited "to the extent of her separate property" (*y*), so that, however fraudulent she may have been in the trust, the Court has no power to imprison her for her contempt *of the order* made against her, when her separate estate has been exhausted. This raises the question, whether the remedy by attachment is practically available at all against a married woman; for, on the application for leave to issue the writ, the Court would have to be satisfied that there was separate property in existence, and, the fact being once before it, would seize upon that property instead of attaching her to serve no useful purpose.

Is attachment available against her?

Different as to "special contempt."

The same reasoning does not, of course, extend to cases of "special contempt," other than payment of money. In such cases there seems to be no limit, as we have seen, to the Court's power of punishment of any person. Personal incapacity has nothing to do with the matter.

Sequestration.

The writ of sequestration would appear to be available to seize and appropriate the separate property, but that property only.

(*x*) *Vide supra*, Book II., Chapter I. (*y*) Sect. 1, sub-sect. (2).

APPENDIX I.

No. 1.—*Demand for Performance of Conditional Judgment.*

See *supra*, O. XLII. r. 9, p. 23.

[*Heading of Action.*]

Take notice that [*here state the condition of the judgment or order which has been performed or happened*], and that the above-named plaintiff is entitled to the relief named in the said judgment (a copy whereof is hereunto annexed). I, therefore, [as solicitor for] the above-named plaintiff, hereby demand of you that you do [*state the act or thing required to be done by the judgment or order*]. And further take notice that if you do not forthwith comply with the said judgment [*or* order], I shall apply for leave to issue execution thereon.

Yours, &c.,

A. B., the above-named plaintiff,
or X. Y., solicitor, &c.

To the above-named defendant, C. D. (*a*).

No. 2.—*Summons for Leave under O. XLII., r.* 9 (*b*).

Supra, O. XLII. r. 9, p. 23 *et seq.*

[*Formal parts as usual.*]

for an order that the plaintiff be at liberty to issue execution [*or* a writ of fieri facias, *as the case may be* (*c*)] against the defendant on the judgment [*or* order] herein dated the day of 18 , and that the plaintiff do pay the costs of and occasioned by this application.

(*a*) There is no rule requiring personal service of this notice. It would appear from the analogy of a notice of motion that personal service is not strictly necessary. No doubt, however, before an order would be made, the Court or judge would require to be satisfied that the demand had come to the knowledge of the defaulting party.

(*b*) A summons should be issued in all cases where leave is necessary, even when the application is *ex parte*, for the reason that the reason for execution issuing should appear upon the record.

(*c*) See, however, terms of O. LII. r. 14, and note to Form No. 5, *infra*.

O. XLII. r. 23 (a), *supra*, p. 24. As to evidence and procedure, p. 22. As to change of parties generally, Ch. I. s. 3.

No. 3.—*Summons and Notice of Motion for Leave on Change of Parties.*

[*Title, &c.*]

Take notice that the Court will be moved, &c., on behalf of [*here name and describe person applying for leave.*] [*If the application be made by summons*]: Let all parties appear before me, at, &c., on the hearing of an application by [*describe person as above, then follow on, both in case of summons and notice of motion*] for an order that the said [*name of person applying for leave*] be at liberty to issue execution against the said on the judgment obtained in this action, and dated the day of 18 .

Notes to O. XLII. r. 23 (a), and reference, *supra*. O. XLII. r. 10. As to execution against member of firm, *supra*, p. 27 *et seq.*

[*When the application is for leave on the change of the party against whom execution is issuable, the above form should be varied by inserting* "plaintiff" *in the place of* "person applying for leave," *and follow on*], be at liberty to issue execution against X. Y. [*insert name and description*], as the heir [*or* husband, *or* member of the firm of Z. & Co., *or as the case may be*], &c. (*d*).

O. XLII. rr. 22, 23 (a), *supra*, pp. 24, 44, 45.

No. 4.—*Notice of Motion or Summons for Leave after Lapse of Six Years.*

[*Formal parts as usual.*]

Take notice that, &c. [*or*, Let all parties attend before me, &c.]. (*See Form No.* 3.)

for an order that the plaintiff be at liberty to issue execution against the defendant on a judgment herein dated the day of 18 , notwithstanding six years have elapsed since such judgment.

This form, varied to meet the circumstances of the particular case, applies wherever leave to issue has been obtained.

No. 5.—*Form of Order giving Leave to issue Execution.*

[*Heading.*]

Upon the application of, &c. [*or*, Upon motion, &c.], and upon reading, &c., whereby it appears that [*set forth the material facts entitling the party to issue execution*], And upon the direction of [his Lordship, Mr. Justice , *or*, the Court, *as the case may be*], that

(*d*) The summons must of course be varied where it is desired to obtain an order in the form of No. 6, *infra*.

this order should be drawn up (*e*). Let the said , as executor of the said plaintiff [*or as the case may be*], be at liberty to issue execution upon the judgment [*or* order] in this matter dated the day of .

See p. 24, and generally, Ch. I. s. 2, sub-s. ii. v.

No. 6.—*Form of Order to carry on Proceedings, and for Leave to issue Execution.*

This form of order can be made where the judgment or order on which it is desired to issue execution is not *finis litium*, but something else remains to be done. *Supra*, Ch. I. s. 3, and pp. 24, 50, 53, 54.

[*Heading.*]

Upon the application of, &c. [*or*, Upon motion &c.], and upon reading, &c., whereby it appears that it has become necessary or desirable that should be made a party to this action in the place and stead of the former [plaintiff *or* defendant (*as the case may be*)], and that [*set forth material facts showing why execution should issue at the suit of or against any of the parties.* Let the further proceedings in this matter be carried on by the said the personal representative of the late [*or as the case may be*], as plaintiff against the said as defendant [*describing the capacity in which he is joined if the defendant is the party changed*]. And let the said be at liberty to issue execution against the said upon the judgment [*or* order] in this matter dated the day of .

No. 7.—*Notice of Motion for Leave to issue Execution against Shareholder under* 8 & 9 *Vict. c.* 16, *s.* 36 (*f*).

O. XLII. r. 23 (d), *supra*, pp. 24, 26 *et seq.*

Chit. Arch. 1073 *et seq.* Chit. Forms, p. 521, n. (*r*).

[*Heading of Action.*]

Whereas by a judgment [*or* order] of the High Court of Justice made in this action and dated the day of 188 , it was adjudged [*or* ordered] that the above-named plaintiff A. B., should recover against the above-named defendants the B. Company, being a company duly incorporated, and to which the provisions of the statute 8 & 9 Vict. c. 16 apply, the sums of £ and £ for

(*e*) The direction from the Court or judge as to the drawing up is, perhaps, essential in the case of such an order as this with no special terms. O. LII. r. 14, *supra*, p. 23. The doubt here expressed is for the reason that this rule 14 in this connection mentions leave to issue *any writ* other than, &c., not leave to issue execution generally.

(*f*) This notice must be served personally (see Ch. Arch. 1073 *et seq.*) upon the shareholder. The company have no *locus standi* to appear.

costs [*state the amounts as in the judgment or order*]. And whereas execution has been issued against the property and effects of the said B. Company, but there cannot be found sufficient whereon to levy such execution, so that the said judgment remains unsatisfied [*or, if partially levied, state extent to which it is unsatisfied*]. And whereas you are a holder of shares in the capital of the said company in respect of which said shares the sum of £ has not been paid up to the said company. Now take notice that this Honourable Court will be moved before his Lordship Mr. Justice on the day of 188 , or so soon thereafter as counsel can be heard by counsel on behalf of the above-named plaintiff for liberty to issue execution against you upon the said judgment [*or* order] to the extent of the said sum of £ being the amount of capital so as aforesaid remaining to be paid upon the said shares held by you as aforesaid [*but where the sum due from the shareholder is greater than that due to the creditor*, for levying against you the amount of the said judgment, viz., the said sums of £ and £ for costs]. And for an order that the costs of this application be paid out of the said sum of £ so due from you as aforesaid.

Dated .

——— Solicitor for the plaintiff.

Irregularity. *Supra*, p. 38.

No. 8.—*Notice of Motion or Summons to amend irregular Execution.*

[*Heading.*]

Take notice / *or* / Let all parties } [*Formal parts as usual.*]

for an order that the plaintiff [*or* defendant] be at liberty to amend the writ of *fieri facias* [*or as the case may be, describing the particular writ*] issued by him in this matter and dated the day of 18 , by [*here state particular amendment asked*]. And that he do pay the costs of the said amendment and of this application (*g*).

Dated, &c.

(*g*) It is necessary to issue this notice or summons when some step has been taken under the irregular writ. Where no step has been taken the application may be *ex parte*.

No. 9.—*Summons to stay Execution.*

O. XLII. rr. 17, 27, *supra*, p. 39.

[*Heading.*]

Take notice / *or* / Let all parties } [*Formal parts as usual.*]

for an order that execution on the judgment [*or* order] herein dated the day of 18 , be stayed.

[*The summons or order may take the form of restraining the party about to issue, and may be varied as to time, &c., to fit the circumstances of the case—for example*], for an order that the plaintiff be restrained from issuing execution upon, &c., until [*he has performed some condition, or the like*].

[*Or, for example*] for an order that the time limited by the judgment [*or* order] dated, &c., for the applicant to [*describe act to be done according to the judgment or order*] may be enlarged to the day of 18 , and that in the meantime execution may be stayed.

No. 10.—*Notice of Motion or Summons to stay Execution on facts arising too late to be pleaded.*

O. XLII. r. 27, *supra*, p. 41.

Take notice / *or* / Let all parties } [*Formal parts as usual.*]

on the part of the defendant [*or as the case may be*] that execution upon the judgment in this action dated the day of 188 , and all other proceedings in this action, may be stayed on the ground that [*state facts which have arisen too late to be pleaded by the applicant rendering it just that execution and the action should be stayed*] (*h*).

(*h*) This form of order is in use where an *auditâ querelâ* would have lain.

Chadwick Healey, Company Law and Practice, 2nd ed. p. 528. *Vide supra*, p. 41.

No. 11.—*Notice of Motion or Summons to stay Execution pending the Hearing of Petition to wind up a Company.*

[*Heading of the Action.*]

Take notice / *or* / Let all parties } [*Formal parts as usual.*]

on the part of the defendant company [*or*, the provisional liquidator, *or*, A. B., the petitioner for the winding up of the said company] for an order that the plaintiff may be restrained from issuing execution on any judgment to be obtained by him in this action [*or*, that the sheriff of may be restrained from removing or selling any goods of the defendant company seized or to be seized by him under the writ of execution issued on the judgment [*or* order] obtained in this action, and dated, &c.] until the hearing of a petition [*or*, the petition of the said A. B.] presented to this Court for the winding up of the said company, or until further order (*i*).

Vide supra, p. 41.

No. 12.—*Notice of Motion or Summons to stay Execution against Company after Winding-up Order has been made.*

[*Heading in the Action.*]

Take notice / *or* / Let all parties } [*Formal parts as usual.*]

on the part of the official liquidator of the above-named company that A. B., of, &c. [*or*, the plaintiff], may be restrained from issuing execution on the judgment [*or* order] obtained by him in this action [*or*, *if the sheriff has already seized*, that the sheriff of may be ordered to withdraw forthwith from the premises of the said company entered upon, and from possession of their goods seized by, him under and in pursuance of a certain writ of *fi. fa.* directed to him, and issued under a judgment obtained by A. B. [*or* the plaintiff] against the said company.]

(*i*) The application for the stay is made to the Division in which, or in the Chancery Division to the judge before whom, the judgment or order was obtained. *In re Artistic Colour Printing Co.*, 14 Ch. D. 502.

No. 13.—*Notice of Motion or Summons to stay Execution pending Appeal.*

O. LVIII. rr. 16, 17, *supra*, p. 42. Dan. Ch. Forms, p. 366, No. 915.

[*Heading.*]

Take notice / *or* / Let all parties } [*Formal parts as usual.*]

on the part of the defendant C. D. [*or as the case may be*] that execution and all other proceedings under the judgment [*or* order] in this action dated the day of 18 , may be stayed until after the hearing of the said defendant's motion by way of appeal from the said judgment [*or* order] of which notice was served on the day of 18 .

No. 14.—*Order staying Execution pending Appeal* (*k*).

Special grounds being shown, *Supra*, p. 42.

[*Heading.*]

Upon motion, &c., it is ordered that the plaintiff [*or* defendant, *or whoever the appellant may be*] do within days from the date hereof, and on security being given him for the return of the sum, if successful in his appeal, pay to the defendant [*or* plaintiff, *or whoever the respondent may be*] the sum of £ found by the judgment [*or* order] herein dated, &c. [*the judgment or order appealed from*], to be due, or if no such security be given, then that the plaintiff [*or* defendant (*appellant*)] do within days from the date hereof pay into Court to the credit, &c. And it is ordered that on either of such payments being made, all proceedings to enforce the judgment [*or* order] dated, &c. [*the order appealed from*] be stayed, provided that the costs payable thereunder shall be duly paid within days of the taxing master's certificate, upon an undertaking of the solicitors receiving them to repay them, if unsuccessful. The costs of this application to be paid by applicant.

(*k*) This is a special form of order; for other forms, see Seton, 1616 *et seq.*

Supra, p. 37.

No. 15.—*Notice of Motion or Summons to set aside Execution.*

[*Heading.*]

Take notice / *or* / Let all parties } [*Formal parts as usual.*]

for an order that the writ of *fieri facias* [*or the particular writ, describing it by name*] issued by the plaintiff [*or* defendant, *as the case may be*] herein, and dated the day of 18 , be set aside and discharged on the ground that it is irregularly issued [*describe the particular cause of irregularity alleged, or*, on the ground that it was so issued in bad faith, *or as the case may be*]. And for an order that the plaintiff [*or* defendant] do pay all costs occasioned by the said writ and of this application.

App. B., No. 21, R. S. C. *Supra*, p. 46. O. XLII. rr. 20 and 21.

No. 16.—*Notice of renewal of Writ of Execution* (*l*).

[*Heading of the Action.*]

Take notice that the writ of directed to the sheriff of , and bearing date the day of 18 , has been renewed for one year from the day of 18 .

Dated the day of 18 .

Signed , of , agent for , solicitor for the .

To the sheriff of .

Supra, p. 58.

No. 17.—*Alias Writ* (*m*).

Victoria [*&c.*]. To the sheriff of , greeting.

We command you, as before we have commanded you, that [&c., *proceed as in ordinary form.*]

(*l*) This notice must be sealed. O. XLII. r. 21.

(*m*) *Alias* and *pluries* writs only differ from the usual or ordinary forms in the addition of a few words. There is no necessity for recitals of the former attempted executions. Forms are from Chitty, p. 437.

No. 18.—*Pluries Writ* (*m*). *Supra*, p. 58.

Victoria [&c.]. To the sheriff of , greeting.

We command you, as often we have commanded you, [&c., *proceed as in the ordinary form.*]

No. 19.—*Notice to Sheriff to return Writ.* Ch. Forms, p. 406. O. LII. r. 11. *Supra*, p. 63.

[*Heading of Action.*]

To the sheriff of (*n*).

I hereby give you notice that I require you, within [four days *in London or Middlesex*, eight days *in any other county* (*o*)], to make a return to the writ of fieri facias [*or as the case may be*] issued by the plaintiff [*or* defendant, *as the case may be* (*p*)] in the above action, and tested the day of , to levy against the said defendant £ and interest, and £ costs [*the form is variable of course, according to the party issuing the writ, and the particular writ issued*].

Dated, &c.

Yours, &c.
X. Y. of .
Solicitor for the plaintiff.

No. 20.—*Order for Examination of Judgment Debtor.* R. S. C., App. K., No. 38. O. XLII. rr. 32, 33, 34. *Supra*, p. 65. O. XLI. r. 5.

18 . [*Here put the letter and number.*]

In the High Court of Justice.

Division.

Between , Judgment creditor.

and

, Judgment debtor.

Upon hearing , and upon reading the affidavit of , filed on the day of , 18 , and .

It is ordered that the above-named judgment debtor [*or* officer of the corporation, *as the case may be*] attend and be orally examined as to whether any and what debts are owing to him [*or* to the

(*m*) See note (*m*), *supra*.

(*n*) This notice should, perhaps, be served personally on the sheriff or undersheriff. Ch. Forms, ed. 1866, 336.

(*o*) By analogy to the old side bar rule. Tidd's Pr. 306 *et seq.*; Tidd's Forms, 108; Ch. Forms, ed. 1866, 336; ed. 1883, 406.

(*p*) Where defendant may issue, *query*; *supra*, p. 75.

defendant corporation, *as the case may be*], before in chambers, at such time and place as he may appoint (*q*), and that the said judgment debtor produce his books [*or as may be ordered*] before the said at the time of the examination, and that the costs of this application be (*r*) [added to the judgment debt].

Dated the day of 18 (*s*).

Supra, p. 71. Ch. Forms, 416. Tidd's Forms, 114.

No. 21.—*Direction of Writ to Elisors* (*t*).

Victoria, &c.

To A. B. and C. D., elisors appointed by the Division of our High Court of Justice in this behalf.

We command you, &c. [*instead of the words* "in your bailiwick," *should be inserted* "in our county of ," *or as the case may be.*]

Supra, p. 76. Wats. Sher. App. 468.

No. 22.—*Form of a Sheriff's Mandate to the Bailiff of a Liberty* (*u*).

N. (*to wit*).

A. B., Esquire, sheriff of the county aforesaid, to the Right Honourable A., Earl of B., high bailiff of the liberty of L. in the county aforesaid, or to his deputy, them greeting:—

By virtue of a certain writ of our lady the Queen to me directed, I command you, and every of you, that you, &c. [*to perform the writ, the same as a common warrant*].

(*q*) When the appointment is obtained, and after or with service of this order, notice in writing of such appointment must be served on the debtor or officer; the form of notice follows the form of this order in its material particulars, see Dan. Ch. Forms, p. 421, No. 1054.

(*r*) These costs are in the discretion of the Court. O. XLII. r. 34.

(*s*) The indorsement required by O. XLI. r. 5, must be made on this order before service. *Vide supra*, p. 234 *et seq.*

(*t*) *Mayor of Norwich* v. *Gill*, 1 Dowl. 246, and note.

(*u*) The return to this mandate, notwithstanding the direction to return to the sheriff, is made to the Court by the bailiff. Wats. Sher. p. 61; 50 & 51 Vict. c. 55, s. 34, sub-s. (*d*).

No. 23.—*Return of Mandavi Ballivo.*

Ch. Forms, 413.
Supra, p. 76.

By virtue of this writ to me directed, I made my mandate to the bailiff of the liberty of in my county, to whom belongeth the execution and return of all writs and processes within the said liberty (*v*), which said bailiff hath returned to me (*x*), that by virtue of my said mandate to him thereupon directed as aforesaid, he hath caused to be made, &c., and that he hath the money, &c.

The answer of S. E., Sheriff.

No. 24.—*Form of Clause of Non omittas* (*y*).

Supra, p. 76.

We command you that you omit not by reason of any liberty of your county, and that [of the goods, *or as the case may be*].

No. 25.—*Præcipe of Writ of Possession.*

R. S. C., App., No. 7.

[*Heading of Action.*]

Seal a writ of possession directed to the sheriff of , to deliver possession to A. B. of .

Judgment dated day of .

No. 26.—*Writ of Possession.*

R. S. C., App. H., No. 8.
Supra, p. 94.

[*Heading of Action.*]

Victoria, by the grace of God, &c.

To the sheriff of , greeting:—

Whereas lately in our High Court of Justice, by a judgment of the Division of the same Court, A. B. recovered [*or*, E. F. was ordered to deliver to A. B.] possession of all that with the appurtenances in your bailiwick; therefore we command you that you omit not by reason of any liberty in your county (*z*), but that you enter the same, and without delay you cause the said A. B. to

(*v*) The words usually inserted here, "and without whom no execution of this writ could be made by me within the same," are not correct (for the sheriff can execute the writ), and ought to be omitted.

(*x*) See note to last form. 50 & 51 Vict. c. 55, s. 34, sub-s. (*f*)

(*y*) 50 & 51 Vict. c. 55, s. 34, sub-s. (*f*). This clause is inserted as the opening clause of the writ.

(*z*) Note that the sheriff must always execute this writ.

have possession of the said land and premises with the appurtenances, and in what manner, &c., and have you there then this writ, &c.

Witness, &c. (*a*).

Ch. Forms, p. 598. *Supra*, p. 101.

No. 27.—*Return to Writ of Possession that no Person came to point out or receive Premises.*

I certify to our Lady the Queen that this writ was delivered to me on the , since which time I have always been ready and willing to execute the same as within I am commanded, but neither the within-named plaintiff A. B., nor any person on his behalf, has ever come to show me the premises within mentioned or to receive possession of the same or any part thereof from me.

Dated, &c.

The answer of sheriff (*b*).

Supra, p. 103.

No. 28.—*Return to Writ of Possession that Possession has been delivered.*

By virtue of the within writ I did, on the day of deliver to the within-named plaintiff A. B. [*or* to C. D. on behalf of the within-named plaintiff] possession of [*here insert a description of the premises of which possession has been delivered. The description should be precise enough to identify them*] and the appurtenances as within I am commanded [*where one writ including both possession and fi. fa. and return to the latter, in form as the case may require*].

Dated, &c. ——— Sheriff.

Supra, p. 102.

No. 29.—*Summons to confine Plaintiff's Execution to certain Premises.*

[*Heading.*]

Let all parties, &c.,

on the hearing of an application on the part of the defendant that execution upon the judgment or order herein dated, &c., be confined to [*here describe the premises*] with their appurtenances (*c*).

(*a*) Where judgment has been recovered for mesne profits or costs, as well as for the land, there may be a joint writ of possession and *fi. fa.* This is simply framed by proceeding after the word appurtenances: "And we further command you that of the goods and chattels, &c.," in the usual way. R. S. C., App. H., No. 7.

(*b*) The return is indorsed on the writ.

(*c*) This summons is available only where the judgment does not

No. 30.—*Order that Plaintiff do restore Possession to Defendant.*

Supra, p. 106. Seton, p. 1599. This is the general form of an order on appeal.

[*Heading.*]

Upon hearing, &c., and upon reading, &c., whence it appeared that the sheriff acting under a writ of possession dated, &c., issued in pursuance of the judgment [*or* order] in this matter dated, &c., has delivered to the plaintiff possession of the premises the subject of this action [*or otherwise describing them for purposes of identification*]. It is ordered that the said judgment [*or* order] be reversed [*or* varied, *as the case may be*], and that the plaintiff do forthwith restore to the defendant the possession of the said premises [*or* of part of the said premises, *as the case may be*], and that the defendant recover the same and for that purpose that he be at liberty to issue a writ of possession therefor (*d*).

No. 31.—*Præcipe of Fieri Facias.*

R. S. C., App. G., No. 1. O. XLII. r. 12.

[*Heading of the Action.*]

Seal a writ of *fieri facias* directed to the sheriff of (*e*) to levy against C. D. the sum of £ and interest thereon at the rate of £ per centum per annum from the day of 18 [and £ costs (*f*)] to . Judgment [*or* order] dated day of .

[Taxing officer's certificate dated day of (*f*).]

X. Y. Solicitor for [*party on whose behalf writ is to issue*].

define with accuracy the lands or premises recoverable. *Doe* d. *Foster* v. *Wandlass*, 7 T. R. 118, *in notis*; *Roe* d. *Blair* v. *Street*, 2 Ad. & El. 329. An order to the effect of the summons is sometimes made on a motion for a new trial. *Brooke* d. *Mence* v. *Baldwin*, Barnes, 468.

(*d*) This order is, of course, subject to great variation according to the circumstances of the case. It is rightly directed to the party and not to the sheriff. *Doe* d. *Williams* v. *Williams*, 4 N. & M. 259; *Roe* d. *Saul* v. *Dawson*, 3 Wils. 49. The method of procedure by way of writ of restitution (as to which see Tidd's Pr. Forms, 557, 655; Ch. Arch. 1229) is, perhaps, better carried out by the simple writ of possession, issuable on some such order as the above, *supra*, p. 106.

(*e*) There must be a separate *præcipe* for each writ issued, no matter how many, into different counties.

(*f*) This is subject to provisions of O. XLII. r. 18, under which separate writ can issue for costs.

R. S. C., App. H., No. 1. Note, as to the incorporation of this writ with writs of possession, delivery, &c., *supra*, p. 404 note. Various forms applicable to different cases set forth in Church. Law of Sheriff, App. p. 516 *et seq.* *Supra*, p. 110.

No. 32.—*Writ of Fieri Facias.*

[*Heading of Action or Matter.*]

Victoria, by the grace of God, &c., of Great Britain and Ireland Queen, Defender of the Faith.

To the sheriff of greeting.

We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of £ , and also interest thereon at the rate of £ per centum per annum from the day of *, which said sum of money and interest were lately before us in our High Court of Justice in a certain action [*or* certain actions, *as the case may be*] wherein A. B. is plaintiff and C. D. defendant [*or* in a certain matter there depending intituled, "In the matter of E. F.," *as the case may be*] by a judgment [*or* order, *as the case may be*] of our said Court bearing date the day of adjudged [*or* ordered, *as the case may be*] to be paid by the said C. D. to A. B., together with certain costs in the said judgment [*or* order, *as the case may be*] mentioned, and which costs have been taxed and allowed by one of the taxing officers of our said Court at the sum of £ as appears by the certificate of the said taxing officer dated the day of . And that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of £ [costs] together with interest thereon at the rate of 4*l.* per centum per annum from the day of *, and that you have that money and interest before us in our said Court immediately after the execution hereof to be paid to the said A. B. in pursuance of the said judgment [*or* order *as the case may be*]. And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution thereof. And have there then this writ.

Witness, &c.

R. S. C., App. H., No. 2. O. XLII. r. 18. *Supra*, pp. 109, 111.

No. 33.—*Fieri Facias on Order for Costs.*

[*Heading of Action or Matter.*]

Victoria, by the grace of God, &c. To the sheriff of .

We command you that of the goods and chattels of in your bailiwick you cause to be made the sum of , for certain costs which, by an order of our High Court of Justice dated the day of , 18 , were ordered to be paid by the said , and which have been taxed and allowed at the said sum, and inte-

* Day of judgment or order, or day on which money directed to be paid, or day from which interest is directed by the order to run, as the case may be.

rest on the said sum at the rate of 4*l.* per centum per annum from the day of 18 , and that you have the said sum and interest before us in our said Court immediately after the execution hereof, to be rendered to the said . And in what manner, &c. And have there then this writ.

Witness, &c.

Levy £ and £ for costs of execution (*g*), &c., and also interest on £ at 4*l.* per centum per annum from the day of 18 , until payment: besides sheriff's poundage, officers' fees, costs of levying, and all other legal incidental expenses (*h*).

This writ was issued by, &c., of , agent for , of , solicitor for .

The is a , and resides at in your bailiwick (*h*).

No. 34.—*Assignment of Leasehold Premises by the Sheriff under a Writ of Fieri Facias.*

Barton's Conveyancing, vol. iii. p. 396. *Supra*, p. 129.

This Indenture, made the day of 18 , between of , sheriff of the county of , of the one part, and of , (*the purchaser*) of the other part. Whereas in a certain action [*or* matter, *as the case may be*] commenced in the Division of Her Majesty's High Court of Justice, and intituled [*insert title of action or matter*], the said , the plaintiff [*or* defendant, *as the case may be*] recovered judgment [*or* obtained an order, *as the case may be*] against the said defendant [*or* plaintiff, *as the case may be*] for the sum of £ , and £ for costs, as by the said judgment [*or* order] duly signed and entered fully appears (*i*). And whereas a writ of *fieri facias* dated the day of 18 , was issued upon the said judgment [*or* order], and upon the day of 18 , was delivered to the said (*sheriff*) to be executed. And whereas the said defendant [*or* plaintiff] was on the said day of 18 , and still is, possessed of and entitled to a certain messuage or tenement [*describe premises shortly*] for a certain term, then and still being unexpired, at and under a certain rent reserved in or by a demise or lease granted to him thereof, or some mesne assignments therefrom or otherwise, which said premises are subject to execution under

(*g*) These costs, usually, where no sale, £1 5*s.*, can be only obtained out of the proceeds of the execution, and not personally from the debtor. *Re Long, Ex parte Cuddeford*, 20 Q. B. D. 316.

(*h*) This indorsement is made in compliance with O. XLII. rr. 13, and 16.

(*i*) The recital of the judgment is, perhaps, not essential. *Doe* d. *Batten* v. *Murless*, 6 M. & S. 110.

the said writ of *fieri facias*. And whereas the said premises having been duly advertised for sale (*k*), and in pursuance thereof put up to sale by public auction at on the day of 18 , the said (*purchaser*) became the highest bidder for, and purchaser of, the same at the sum of £ . Now this indenture witnesseth, that in consideration of the said sum of £ paid by the said (*purchaser*) to the said (*sheriff*), the receipt whereof he doth hereby acknowledge, he, the said (*sheriff*), doth bargain, sell, assign and set over to the said (*purchaser*) All [*describe the said premises*] with the appurtenances, To hold to the said (*purchaser*), his executors, administrators and assigns, for all the residue of the estate which he, the said defendant [*or as the case may be*], or any other person or persons in trust for him (*l*) have or had therein or thereto, and which he, the said (*sheriff*), can or may assign or set over in anywise whatsoever.

In witness, &c.

See Ch. Forms, p. 408. *Supra*, p. 137.

No. 35.—*Return of Fieri feci.*

By virtue of this writ to me directed I have caused to be made of the goods and chattels of the within-named C. D. the moneys and interest within mentioned, which I have ready, at the day and place within mentioned (*m*), to be rendered to the within-named A. B., as I am within commanded.

The answer of , sheriff.

Ch. Forms, p. 409. *Supra*, p. 138.

No. 36.—*Return of Nulla bona.*

The within-named C. D. [*execution debtor*] has no goods or chattels in my bailiwick whereof I can cause to be made the moneys and interest within mentioned, or any part thereof (*n*), as within I am commanded.

The answer of sheriff.

(*k*) Having regard to the wording of sect. 145 of the Bankr. Act, 1883, it is questionable whether advertisement of a sale of a term of years is necessary.

(*l*) This is somewhat doubtful, *supra*, p. 129.

(*m*) This is the usual form, but is not, it is submitted, quite correct, for no day is mentioned in the writ for payment, except "immediately after the execution hereof." On the face of it this return confesses the sheriff to be in contempt. It is suggested that the form might run,—"I have ready on demand being made of me by the plaintiff or his solicitor, to be rendered, &c."

(*n*) These words are essential, for where the sheriff can levy part only of the debt he must return *fieri feci* as to that part, *nulla bona* as to residue; *supra*, p. 138.

No. 37.—*Return of Fieri feci as to Part, Nulla bona as to Residue.*

Ch. Forms, p. 409. *Supra*, p. 138.

By virtue, &c. [*copy Form* 35 *to* "the within-named C. D."] to the value of £ , which sum I have ready, &c. [*as in Form* 35]. And I further certify and return that the said C. D. hath no more goods and chattels in my bailiwick whereof I can cause to be made the residue of the within-mentioned moneys and interest, or any part thereof, as I am within commanded.

The answer of , sheriff.

No. 38.—*Notice to Sheriff under* 8 *Anne, c.* 14, *s.* 1, *of Rent due to Landlord of Execution Debtor* (*o*).

Supra, p. 142.

To the sheriff of the county of , and his under-sheriff, bailiffs, and all others whom it may concern.

Take notice, that the sum of £ is now due and owing to [me, *or* J. S. of] from C. D. of in the county of [*the execution debtor*], for [one year's, *or* one half-year's, *or* one quarter's] rent due on the day of last, in respect of the premises in his occupation at aforesaid, upon which premises, as I am informed, you have seized and taken in execution certain goods and chattels. And you are hereby required not to remove any of the said goods and chattels from off the said premises until the said arrears of rent are paid, pursuant to the statute in such case made and provided.

Dated this day of 18 .

Yours, &c.,

J. S. of [*or* E. F. of , agent for J. S. of].

No. 39.—*Notice from Sheriff to Execution Creditor that Rent is due from Defendant, and requiring Payment thereof by such Creditor, pursuant to* 8 *Anne, c.* 14.

Supra, p. 142.

[*Heading of Action.*]

Take notice, that the sum of £ is due and owing from the above-named defendant to his landlord of , for [one year's, *or* one-half year's, *or* one-quarter's rent] due on the

(*o*) For this and the following form the author is indebted to Woodfall's Landlord and Tenant, App. D., Forms (9) and (10).

day of last, for and in respect of the [house or farm, land, and] premises situate at in the county of , now in the occupation of the said defendant, and upon which certain goods and chattels have been seized by the sheriff of shire under the writ of *fieri facias* issued in this action [and (*where it is the case*) the sheriff has had notice of such arrears of rent]. Now I do hereby, as the agent of the said sheriff, and on his behalf, give you notice that unless the above-named plaintiff do forthwith pay the arrears of rent due to the said landlord either to him or to his bailiff, the said sheriff will withdraw from the possession of the said goods and chattels under the said writ.

Dated this day of 18 .

[L. M.]
Agent for the sheriff of shire.

To the above-named plaintiff, and to Mr. , his solicitor, or agent.

Supra, p. 144.

No. 40.—*Return of Goods in hand for want of Buyers.*

By virtue of this writ to me directed, I have taken goods and chattels of the within-named C. D., in my bailiwick, of the value of £ [*or*, I have taken the goods and chattels of the within-named C. D. to be found in my bailiwick, value unknown (*p*)], which goods and chattels remain in my hands unsold for want of buyers. Therefore, I cannot have the amount of judgment and costs before our lady the Queen at the day and place within mentioned, as I am within commanded (*q*).

R. S. C., App. G., No. 3.

No. 41.—*Præcipe of Venditioni Exponas.*

[*Heading.*]

Seal a writ of *venditioni exponas* directed to the sheriff of , to sell the goods and [*describe property*] of C. D., taken under a writ of *fieri facias* in this action tested day of .

X. Y., Solicitor for ———.

(*p*) *R.* v. *Sheriff of Herts*, 9 Dowl. 916; *Philips* v. *Morgan*, 4 B. & Ald. 652. This form of return is suggested instead of the usual form assessing the value of the goods, because of the doubt expressed whether the sheriff is not bound to find buyers at the estimated sum. *R.* v. *Bird*, 2 Show. 87. *Vide supra*, p. 124.

(*q*) This return is, of course, variable according to whether part of the sum to be levied has been realised or not, in which case the return will be, of course, *fieri feci* as to part, and this as to residue.

No. 42.—*Writ of Venditioni Exponas.*

R. S. C., App. H., No. 4.
Supra, p. 144.

[*Heading.*]

Victoria, by the grace of God, &c.

To the sheriff of , greeting.

Whereas by our writ we lately commanded you that of the goods and chattels of C. D. [*here recite the fieri facias to the end*]. And on the day of , 18 , you returned to us in the Division of our High Court of Justice aforesaid, that, by virtue of the said writ to you directed, you had taken goods and chattels of the said C. D. to the value (*r*) of the money and interest aforesaid, which said goods and chattels remained in your hands unsold for want of buyers. Therefore, we, being desirous that the said A. B. should be satisfied his money and interest aforesaid, command you that you expose to sale, and sell, or cause to be sold, the goods and chattels of the said C. D. by you in form aforesaid taken, and every part thereof, for the best price that can be gotten for the same, and have the money arising from such sale before us in our said Court of justice immediately after the execution hereof to be paid to the said A. B. And have there then this writ.

Witness, &c. (*s*).

No. 43.—*Præcipe of Distringas against Ex-Sheriff.*

R. S. C., App. G., No. 11.

[*Heading.*]

Seal a writ of *distringas nuper vicecomitem quod venditioni exponat* directed to the sheriff of , to sell the goods and of , taken under a writ of *fieri facias* in this action tested the day of , 18 .

Dated the day of , 18 .

Signed ———.

(Address) ———,

Solicitor for ———.

No. 44.—*Distringas against Ex-Sheriff.*

R. S. C., App. H., No. 14.
Supra, p. 145.

[*Heading.*]

Victoria, by the grace of God, &c.

To the sheriff of , greeting.

We command you that you distrain , late sheriff of your county aforesaid, by all his land and chattels in your bailiwick, so

(*r*) See note to Form No. 40.

(*s*) Corresponding form under old procedure, 2 Saund. 47 ee.

that neither he, nor any one by him, do lay hands on the same until you shall have another command from us in that behalf, and that you answer to us for the issues of the same so that the said expose for sale, and sell, or cause to be sold, for the best price that can be gotten for the same, those goods and chattels which were of in your bailiwick to the value of £ [the amount of *or* part of] the sum of £ , which lately before us in our High Court of Justice in a certain action, wherein plaintiff and defendant, by a judgment [*or* order] of our said Court bearing date the day of , was adjudged [*or* ordered] to be paid by the said to the said , and of the sum of £ , the amount at which the costs in the said judgment [*or* order] mentioned have been taxed and allowed, and of interest on the said sum of £ at the rate of 4*l.* per centum per annum from the day of , and on the said sum of £ at the same rate from the day of , which goods and chattels he lately took by virtue of our writ, and which remain in his hands for want of buyers, as the said late sheriff hath lately returned to us in our said Court. And have the money arising from such sale before us in our said Court immediately after the execution hereof to be paid to the said . And have there then this writ (*t*).

Witness, &c.

This writ was issued by, &c.

The defendant is a , and resides at , in your bailiwick.

Supra, p. 145.

No. 45.—*Motion to increase Issues taken under Distringas nuper vicecomitem.*

[*Heading.*]

Take notice that, &c.

for an order that X. Y., Esquire, the sheriff of the county of be ordered to return the sum of £ ; issues on the next distringas to be issued in this cause (*u*).

(*t*) This is substantially the same form which has always been in use. See 2 Saund. 47 dd.

(*u*) This procedure is seldom called into exercise, but it is undoubtedly the right process in the few cases where the liability to dispose of goods remains in the ex-sheriff.

No. 46.—*Præcipe of Writ of Elegit.*

R. S. C., App. G., No. 2.

[*Heading.*]

Seal a writ of elegit directed to the sheriff of against of , in the county of , for not paying to A. B. the sum of £ , together with interest thereon from the day of [and the sum of £ for costs], with interest thereon at the rate of 4*l.* per centum per annum.

Judgment [*or* Order] dated the day of 18 .

[Taxing officer's certificate dated day of 18 .]

X. Y., solicitor for .

No. 47.—*Form of Writ of Elegit.*

R. S. C., App. H., No. 3. *Supra*, Book I. Ch. V. p. 163.

[*Heading.*]

Victoria, by the grace of God, &c.

To the sheriff of , greeting:

Whereas lately in our High Court of Justice in a certain action [*or* certain actions, *as the case may be*] there depending, wherein A. B. is plaintiff, and C. D. defendant [*or* in a certain matter there depending, intituled "In the matter of E. F.," *as the case may be*], by a judgment [*or* order, *as the case may be*] of our said Court made in the said action [*or* matter, *as the case may be*], and bearing date the day of , it was adjudged [*or* ordered, *as the case may be*] that C. D. should pay unto A. B. the sum of £ , together with interest thereon after the rate of £ per centum per annum from the day of , together also with certain costs as in the said judgment [*or* order, *as the case may be*] mentioned, and which costs have been taxed and allowed by , one of the taxing officers of our said Court, at the sum of £ as appears by the certificate of the said taxing officer dated the day of 18 . And afterwards the said A. B. came into our said Court, and, according to the statute in such case made and provided, chose to be delivered to him all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C. D. or any one in trust for him was seised or possessed of on the day of , in the year of our Lord [*the day on which the judgment or order was made*], or at any time afterwards, or over which the said C. D. on the said day of , or at any time afterwards, had any disposing power which he might, without the

assent of any other person, exercise for his own benefit, to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns until the said two several sums of £ and £ , together with interest upon the said sums at the rate of £ per centum per annum from the day of [*date of judgment or order, unless by the judgment or order interest is ordered to run from some other date*], shall have been levied. Therefore, we command you without delay you cause to be delivered to the said A. B. by a reasonable [price and (*x*)] extent all such lands and tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick as the said C. D., or any person or persons in trust for him, was or were seised or possessed of on the said day of [*date of judgment or order*], or at any time afterwards, or over which the said C. D., on the said day of [*date of judgment or order*], or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns until the said two several sums and interest as aforesaid shall have been levied. And in what manner you shall have executed this our writ make appear to us in our Court aforesaid immediately after the execution thereof under your seals, and the seals of those by whose oath you shall make the said extent. And have there then this writ.

Witness, &c.

No. 48.—*Form of Return of Nihil to Elegit.*

The within-named C. D. hath not, nor hath any person in trust for him, any lands, tenements, rectories, tithes, rents, or hereditaments in my bailiwick, nor are there in my bailiwick any lands, tenements, rectories, tithes, rents, or hereditaments over which he has a disposing power. I cannot cause to be delivered any of the same to the said A. B., as within I am commanded.

The answer of sheriff.

(*x*) The word price now unnecessary, having relation to goods only; *vide supra*, p. 168.

No. 49.—*Return of Lands delivered, and of the Inquisition under an Elegit* (*y*). *Supra*, pp. 173, 178.

By virtue of this writ to me directed, I have caused to be delivered to the within-named A. B. all the lands which the said C. D. hath in my bailiwick, as within I am commanded.

The execution of this writ appears in the inquisition hereunto annexed.

The answer of sheriff.

Inquisition where Lands extended.

County of to wit. An inquisition indented, taken at in the said county of on the day of 18 , before me , sheriff of the said county, by virtue of the writ of our sovereign lady Queen Victoria to me directed and hereunto annexed, on the oath of [*insert the names of the twelve jurors*], good and lawful men of my bailiwick, who, being duly sworn and charged upon their oath, say that C. D. in the said writ named was, on the day of taking this inquisition [*in the case of a voluntary conveyance by C. D. since the date of the judgment insert:* on the day of the date of the said judgment, and still is, as against and in respect of the said A. B., and his right under and by virtue of the said writ (*z*)], seised in his demesne as of fee [*or, where he is not entitled to an estate in fee, describe the estate in appropriate terms, the description and not the limitations of the estate being sufficient, e.g.*, seised of an estate of freehold for the term of his natural life, *or* seised of an estate tail to him and the heirs of his body (*a*) *or* possessed of the residue of a term of years commencing from the day of and now having years to come and unexpired] of and in a certain messuage or dwelling-house and farm with the appurtenances thereto belonging, commonly known or called by the name of , situate and being [*a sufficient description should here be inserted of the land extended, and should be precise enough for purposes of identification. In some cases this is a matter of nicety, as, for example, where C. D. is merely a tenant in common or joint tenant. Where the estate delivered is subject to any lease or tenancy the particulars should appear in the inquisition* (*b*). *The description, where practicable, should*

(*y*) The return being a muniment of title should be engrossed on parchment.

(*z*) See fully as to this, *supra*, p. 188 *et seq.*

(*a*) *Vide supra*, p. 175 *et seq.*

(*b*) For example, where the estate is subject to a mortgage created by demise. *Vide supra*, p. 177. It was formerly necessary to set forth, by metes and bounds, the land delivered, being a moiety of the debtor's land. *Fenny* v. *Durrant*, 1 B. & Ald. 40; *Morris* v. *Jones*, 2 B. & C. 243; *Sherwood* v. *Clark*, 15 M. & W. 764. *Vide supra*, p. 178.

be taken from the conveyance to or other title deeds of the debtor], and being of the yearly value of £ in all issues beyond reprizes, which said premises I the said sheriff, on the aforesaid day of taking this inquisition, have caused to be delivered to the said A. B. at a reasonable extent, subject to [*the said tenancies, or leases where there are any*], to hold according to the nature and tenure thereof to him and his assigns, according to the form of the statutes in such case made and provided, until the said several sums of £ and £ in the said writ mentioned, together with the said interest thereon, shall have been levied. And lastly, the jurors aforesaid upon their oath say that the said C. D. on the aforesaid day of taking this inquisition had not, nor had any person in trust for him, nor had he, or any person in trust for him, on the said day of [*the date of the judgment or order*], or at any time afterwards [*where necessary insert*, other than such lands as since the said day of , *the date of the judgment*, he hath disposed of for valuable consideration], any other or more lands or tenements, nor any rectory, tithes or hereditaments in the said county whereof he the said C. D. is or was seised or possessed, nor had he the said C. D. at the date of such judgment, or any time afterwards, any other or more lands [&c.] in the county aforesaid over which he had any disposing power which he might, without the assent of any other person, have exercised for his own benefit to the knowledge of the said jurors.

In witness, &c. (*c*).

——— Sheriff.

———
———
——— &c. } [*Jurors.*]

Supra, p. 185. No. 50.—*Summons for Accounts against Tenant by Elegit.*

[*Heading of Action.*]

Let all parties [&c.]

on the hearing of an application on the part of the above-named for an order that an account be taken of what is due to the above-named [*or his assignee, as the case may be*], the tenant by elegit under the judgment [*or* order] made herein, and dated the day of , and in respect of the costs consequent upon such judgment [*or* order] and of this application to be taxed.

(*c*) The inquisition is under the seals of the sheriff and jurors.

No. 51.—*Order for taking Account under an Elegit.*

Dan. Ch. Forms, p. 392, Form 985. *Vide supra*, p. 185.

[*Heading.*]

Upon motion, &c., on the part of, &c., it is ordered—

1. That an account may be taken of what is due to the above-named A. B. [*the tenant by elegit*], on the judgment [*or* order] made in this action on the day of 18 , and for his costs of this application, and consequent thereon such costs to be taxed (*d*).

2. That an account may be taken of the rents, issues, and profits of [*describe the premises as in the inquisition*], being the premises whereof possession was, on the day of 18 [*the date of the inquisition*], under and by virtue of a writ of elegit issued on the said judgment [*or* order], received by the said A. B., or by any other person or persons by his order or for his use, or which, without his wilful neglect or default, might have been so received (*e*).

3. That if, upon taking the said accounts, it shall appear that the amount of the said rents, issues, and profits so received, or which ought to have been received, as aforesaid, is less than the amount which shall appear to be due to the said A. B. upon the said judgment [*or* order], and for costs as aforesaid, then the said C. D. [*the execution debtor*] may be at liberty to pay to the said A. B. what shall appear to be due to him upon the said judgment [*or* order], and for costs as aforesaid, after giving credit for the sum so received, or which ought to have been received, by him as aforesaid. And that upon such payment being made, the said A. B. may be ordered to deliver possession of the said premises to the said C. D. (*f*).

4. That if, upon taking the said accounts, it shall appear that the sum so received, or which ought to have been received, as aforesaid, is greater than the amount which shall appear to be due to the said A. B. upon the said judgment [*or* order], and for costs as aforesaid, then the said A. B. may be ordered to pay to the said C. D. what shall appear to have been received by him, or should have been received by him, as aforesaid, after giving credit for the amount which shall appear to be due to him upon the said judgment [*or* order] and for costs as aforesaid. And that the said A. B. may also be ordered to deliver possession of the said premises to the said C. D.

(*d*) As to including in these costs the costs of the inquisition, *vide supra*, p. 194.

(*e*) As to the liability to account as a mortgagee in possession, *vide supra*, p. 185. *Bull* v. *Faulkner*, 1 De G. & S. 685.

(*f*) This part of the order replaces to a great extent, if not completely, the old writ of restitution. *Vide supra*, pp. 106, 405, note.

R. S. C., App. G., No. 8. Dan. Ch. Forms, p. 427, No. 1067.

No. 52.—*Præcipe of Writ of Delivery.*

[*Heading.*]

Seal a writ of delivery directed to the sheriff of , to make delivery to A. B. of the chattels specified in the judgment [*or* order (*g*)] dated the day of 18 .

Dated the day of 18 .

R. S. C., App. H., No. 10. *Vide supra*, Book I., Ch. VI., and p. 198.

No. 53.—*Writ of Delivery.*

[*Heading.*]

Victoria, by the grace of God, &c.

To the sheriff of , greeting:

We command you that without delay you cause the following chattels, that is to say [*here enumerate the chattels recovered by the judgment or order, for the return of which execution has been ordered to issue*], to be returned to A. B., which said A. B. lately in our High Court of Justice recovered against C. D. [*or*, C. D. was ordered to deliver to the said A. B.] in an action in the Division of our said Court. *And we further command you that if the said chattels cannot be found in your bailiwick, you distrain the said C. D. by all his lands and chattels in your bailiwick, so that neither the said C. D., nor any one for him, do lay hands on the same until the said C. D. render to the said A. B. the said chattels. ‡

And in what manner, &c.

And have you there then this writ.

Witness, &c.

R. S. C., App. H., No. 11. *Supra*, p. 198.

No. 54.

[*The like, but instead of a distress until the chattel is returned commanding the sheriff to levy on defendant's goods, the assessed value of it—*

*Proceed as in the preceding form until the *, and then thus:*]

And we further command you that if the said chattels cannot be found in your bailiwick, of the goods and chattels of the said C. D. in your bailiwick you cause to be made £ [*the assessed value of the chattels*] ‡ And in that manner, &c.

And have you there then this writ.

Witness, &c.

(*g*) *Vide supra*, p. 196, as to necessity for an *assessed* value being placed on the goods before the writ can issue at all, and consequent uncertainty whether the writ issues on an order as distinguished from a judgment.

No. 55.

R. S. C., App. H., No. 11. *Supra*, p. 198.

[*If in either of the preceding forms it is wished to include damages, costs, and interest, proceed to the* ‡, *and continue thus:*]

And we further command you that of the goods and chattels of the said C. D. in your bailiwick, you cause to be made the sum of £ [*damages*]. And also interest thereon at the rate of 4*l.* per centum per annum from the day of , which said sum of money and interest were in the said action by the judgment therein [*or* by order dated the day of] adjudged [*or* ordered] to be paid by the said C. D. to A. B., together with certain costs in the said judgment [*or* order] mentioned, and which costs have been taxed and allowed by one of the taxing officers of our said Court at the sum of £ , as appears by the certificate of the said taxing officer, dated the day of . And that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of £ [*costs*], together with interest thereon at the rate of 4*l.* per centum per annum from the day of . And that you have that money and interest before us in our said Court immediately after the execution hereof to be paid to the said A. B. in pursuance of the said judgment [*or* order]. And in what manner, &c.

And have you there then this writ.

Witness, &c.

No. 56.—*Return of Nulla bona, and that Defendant is a Beneficed Clerk* (*h*).

Ch. Forms, p. 413. *Supra*, p. 200.

The within-named C. D. has no goods or chattels, nor any lay fee in my bailiwick, which I can seize or take, or pay, or deliver to the within-named A. B., or whereof I can cause to be made the moneys [*or* £], and interest within mentioned, or any part thereof, as I am within commanded; but I do hereby certify that the said C. D. is a beneficed clerk, to wit, rector of the rectory [*or* vicar of the vicarage, *or as the case may be*] and parish church of in my county, which said rectory [*or* vicarage] and parish church are within the diocese of the Right Reverend Father in God , by Divine permission Lord Bishop of [*or* within the peculiar jurisdiction of the Very Reverend the Dean and Chapter of the Cathedral Church of St. [Peter of York], and instituted to try them as ordinary, *as the case may be*].

(*h*) It is on this return that execution against ecclesiastical goods is founded.

R. S. C., App. G., Nos. 4, 5.

No. 57.—*Præcipe of Fieri Facias, or Sequestrari Facias de bonis Ecclesiasticis* (*i*).

[*Heading.*]

Seal a writ of *fieri facias* [or *sequestrari facias*] *de bonis ecclesiasticis* directed to the Bishop of [*or* Archbishop, *as the case may be*], against C. D. for not paying A. B. the sum of .

Judgment [*or* order] dated day of .

[Taxing officer's certificate dated day of , 18 .]

X. Y.,
Solicitor for ———.

R. S. C., App. H., No. 5.

Supra, p. 202.

No. 58.—*Writ of Fieri Facias de bonis Ecclesiasticis.*

[*Heading.*]

Victoria, by the grace of God, &c.

To the Right Reverend Father in God [*John*], by Divine permission Lord Bishop of , greeting.

We command you, that of the ecclesiastical goods of C. D., clerk in your diocese, you cause to be made £ , which lately before us in our High Court of Justice in a certain action [*or* certain actions, *as the case may be*] wherein A. B. is plaintiff and C. D. is defendant [*or* in a certain matter there depending, intituled "In the matter of E. F.," *as the case may be*] by a judgment [*or* order, *as the case may be*] of our said Court bearing date the day of , was adjudged [*or* ordered, *as the case may be*] to be paid by the said C. D. to the said A. B., together with interest on the said sum of £ at the rate of £ per centum per annum from the day of , and have that money, together with such interest as aforesaid, before us in our said Court immediately after the execution hereof, to be rendered to the said A. B., for that our sheriff of returned to us in our said Court on day of [*or* "at a day now past"] that the said C. D. had not any goods or chattels, or any lay fee in his bailiwick whereof he could cause to be made the said £ , and interest aforesaid, or any part thereof, and that the said C. D. is a beneficed clerk (to wit) rector of the rectory [*or* vicar of the vicarage] and parish church of in the said sheriff's county, and within your diocese [*as in the return*]. And in what manner, &c. And have you there then this writ.

Witness, &c.

(*i*) It is submitted that the officer issuing the writ should be satisfied of the return set forth in the last form having been made.

No. 59.—*Writ of Fieri Facias de bonis Ecclesiasticis to the Archbishop during the Vacancy of the Bishop's See.*

R. S. C., App. H., No. 6. *Supra*, p. 201, n. (*l*).

Victoria, by the grace of God, &c.

To the Most Reverend Father in God [*John*], by Divine Providence Lord Archbishop of Canterbury, Primate of all England, and Metropolitan [*or* To the Most Reverend Father in God [*John*], by Divine Permission Lord Archbishop of York, Primate of England, and Metropolitan], greeting.

We command you that of the ecclesiastical goods of C. D., clerk in the diocese of which is within the province of [Canterbury], as ordinary of that church, the episcopal see of now being vacant, you cause to be made [*&c. conclude as in the preceding form*].

No. 60.—*Writ of Sequestrari facias de bonis Ecclesiasticis.*

R. S. C., App. H., No. 7. *Supra*, p. 202.

Victoria, by the grace of God, &c.

To the Right Reverend Father in God [*John*], by Divine permission Lord Bishop of , greeting.

Whereas we lately commanded our sheriff of that he should omit not by reason of any liberty of his county, but that he should enter the same and cause [to be made, *if after the return to a fieri facias, or* delivered, *if after the return to an elegit, &c., and in either case recite the former writ*]. And whereupon our said sheriff of on [*or* "a day past"] returned to us in the Division of our said Court of Justice, that the said C. D. was a beneficed clerk, that is to say, rector of the rectory [*or* vicar of the vicarage] and parish church of in the county of and within your diocese, and that he had not any goods or chattels, or any lay fee in his bailiwick [*here follow the words of the sheriff's return*]. Therefore, we command you that you enter into the said rectory [*or* vicarage] and parish church of and take and sequester the same into your possession, and that you hold the same in your possession until you shall have levied the said £ , and interest aforesaid, of the rents, tithes, rent-charges in lieu of tithes, oblations, obventions, fruits, issues, and profits thereof, and other ecclesiastical goods in your diocese of and belonging to the said rectory [*or* vicarage] and parish church of and to the said C. D. as rector [*or* vicar] thereof to be rendered to the said A. B., and in what manner, &c.

And have you there then this writ.

Witness, &c.

Ch. Forms, p. 573. (*k*) *Supra*, p. 202.

No. 61.— *Warrant from the Bishop on a Fieri facias de bonis Ecclesiasticis.*

———, by Divine permission Bishop of . To of , greeting.

Whereas we have with all due reverence lately received her Majesty's writ, hereinafter set forth, issuing out of the Queen's Bench Division of her Majesty's High Court of Justice in the words following, to wit [*reciting in full the fi. fa. de bonis ecclesiasticis*], on which said writ there was and is a certain indorsement in writing directing us to levy £ [&c., *recite indorsement in full*]. We therefore, by virtue of and in obedience to the said writ, and inasmuch as in us lies duly executing the same, have sequestrated all and singular the tithes, rent-charges in lieu of tithes, fruits, profits, oblations, obventions, and all other ecclesiastical rights and emoluments of and belonging to the rectory [*or* vicarage] and parish church of , in the county of , and diocese of , of which the said C. D. mentioned in the said writ is the present rector [*or* vicar], and by these presents do sequester the same, and give and grant unto you the said E. F. full power and authority to sequestrate, collect, levy, gather, and receive all and singular the tithes, rent-charges in lieu of tithes, fruits, profits, oblations, obventions, and all other ecclesiastical rights and emoluments of and belonging to the rectory [*or* vicarage] and parish church of aforesaid, and the same to sell and dispose of, and the money arising therefrom to apply to and for the due payment of the £ and interest, in the said writ mentioned, subject to the said indorsement on the said writ, and also subject to a decree made and interposed by us on in a certain cause or business depending before us in judgment against the said C. D., that the said fruits, profits, and emoluments whatsoever of the said rectory [*or* vicarage] and parish church of should be sequestrated for and during the space of three years, to the end that the said parish church and cure of souls within the same might be duly supplied with the performance of divine service, and that the parsonage house, together with the other buildings on the premises, might be put and kept in substantial repair, and that all duties and impositions incumbent on the said rectory [*or* vicarage] might be discharged; and subject also to the execution of the same decree; and also to publish or cause to be published this our present sequestration on the church door of the parish church of aforesaid, previously to the commencement of the celebration of divine

(*k*) See also similar form given in note to *Pack* v. *Tarpley*, 9 A. & E. 468.

service (*l*), and in such fit terms and in such fit places as to you shall seem most proper and expedient, hereby requiring you to take care and provide that during this our present sequestration, the cure of souls within the said parish of be well, duly, and canonically supplied with the performance of divine service by some fit and able minister, to be approved of or nominated by us or our successors if occasion shall require; and that the said parsonage house, together with the other buildings and fences on the premises, may be repaired and kept and continued in substantial repair, and all tenths, subsidies, procurations, synodals, and all other impositions, both ordinary and extraordinary whatsoever, incumbent on and payable out of the said rectory [*or* vicarage], be well and duly satisfied, answered, and paid during the continuance of this our present sequestration; and lastly, that you make and render before us, or our vicar-general and official principal, or other competent judge in this behalf, a true, just, and faithful account of and upon your receipts and disbursements in your office of sequestrator, when and at such time or times as you shall thereunto be lawfully required. In witness whereof we have caused the seal of office of the worshipful , doctor of laws, our vicar-general and official principal, which we use in this behalf, to be affixed to these presents.

Dated at , the day of , in the year of our Lord 18 , [and in the year of our translation].

No. 62.—*Warrant or Sequestration on Writ of Sequestrari facias de bonis ecclesiasticis from the Bishop.*

Ch. Forms, 575.
Supra, p. 202.

[*Samuel*], by Divine permission Lord Bishop of [*Oxford*]. To our beloved in Christ, J. B., of , greeting.

Whereas we have lately, with all due obedience and humility, received the writ of our sovereign lady Victoria, by the grace of God, &c., to be executed in the words following, to wit [*copy the writ of seq. fa.*], and which said writ was indorsed to levy £ [*recite the indorsement*]. We therefore, being willing, as is our duty, to obey the will and command of our said lady the Queen, according to the exigence of the said writ, have sequestered all and singular the fruits, tithes, rent-charges in lieu of tithes, oblations, obventions, issues and profits whatsoever to the said rectory and parish church of , [*or* the said vicarage and parish church of

(*l*) *Vide* p. 203, *supra*.

], in the county of , and diocese of within our jurisdiction, and to the aforesaid , the incumbent thereof, belonging or in anywise appertaining [*here follow the return*], and do sequester the same by these presents; To publish therefore, or cause to be published, this our sequestration, so by us interposed, to all and singular the persons that are or shall be interested therein, on such days and in such places as are proper and convenient in this behalf, and also to ask for, demand, collect, levy and receive all and singular the said fruits, tithes, rent-charges in lieu of tithes, oblations, obventions, issues and profits whatsoever to the said rectory and parish church of , [*or* to the said vicarage and parish church of] howsoever belonging or in anywise appertaining, and with the same so collected, levied and received, to cause the cure of the said church to be duly supplied with divine offices and other requisites, and all charges and duties belonging to the said church to be sustained, and to render a true and just account of the residue of what you shall have so collected, levied and received to us, or to our vicar-general and official principal, when you shall be duly required so to do, and discharge all other things needful and necessary in that behalf, and which the tenor of the said writ requires to be done; we commit unto you, the said J. B., our power and authority by these presents until we shall think fit to release the same. In testimony whereof we have caused the seal of our Consistorial Episcopal Court to be hereunto affixed this day of 18 .

J. D.,
Deputy Registrar of the diocese of .

R. S. C., App. G., No. 10. Dan. Ch. Forms, p. 396, No. 995.

No. 63.—*Præcipe for Writ of Attachment.*

[*Heading.*]

Seal in pursuance of order dated the day of 18 , an attachment directed to the sheriff of , against C. D. for not [*here specify the act required by the judgment or order to be performed.*]

Dated the day of 18 .

[*Name and address of solicitor or party issuing the writ.*]

No. 64.—*Writ of Attachment* (*m*). R. S. C., App. H., No. 12. *Supra*, p. 230.

[*Heading.*]

Victoria, by the grace of God, &c.

To the sheriff of , greeting.

We command you to attach C. D. so as to have him before us in the Division of our High Court of Justice, wheresoever the said Court shall then be, there to answer to us as well touching a contempt which he, it is alleged, hath committed against us, as also such other matters as shall be then and there laid to his charge, and further, to perform and abide such order as our said Court shall make in this behalf, and hereof fail not, and bring this writ with you.

Witness, &c.

[*Indorsement.*] Dan. Ch. Forms, p. 397, No. 997.

This writ, if issued for default in payment of money, is subject to the following limitations:—

If under section 4 of the Debtors Act, 1869, it does not authorize imprisonment for any longer period than *one year*.

If issued under section 5 of the same Act, it does not authorize imprisonment for any longer period than *six weeks*.

[*Further indorsement.*]

This writ was issued by of [*place of abode or office of business*], solicitor for the within-named who resides at and was issued for [*here state nature of contempt*].

No. 65.—*Indorsement on Copy Judgment or Order for Service* (*n*). O. XLI. r. 5.

If you, the within-named C. D., neglect to obey this judgment [*or* order] by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment [*or* order].

(*m*) This form is identical with that in use in Chancery. Braithw. Pr. 158. The common law writ was practically the same; see forms in Tidd, Pr. Forms.

(*n*) This is the form prescribed by O. XLI. r. 5, but it has the disadvantage of not setting forth, as the old forms did, the consequences of disobedience. See the forms given in Braithw. Pr. 167. *Vide supra*, p. 234.

Seton, 1559. *Supra*, p. 238.

No. 66.—*Order for Substituted Service of Judgment or Order.*

Whereas by the judgment [*or* order] dated &c., it was ordered [*recite things required to be performed*]. Now upon motion &c., who alleged [*state from affidavit to the effect*] that the plaintiff hath been unable to serve the defendant B. with the said judgment [*or* order], although due diligence hath been used for that purpose, as by the affidavit of &c., filed &c. appears; and upon reading the said judgment [*or* order] and affidavit, the Court doth order that service of the said judgment [*or* order] dated &c., together with a copy of this order upon at [*or* upon C. D. &c., members of the firm of &c., or one of them], be deemed good service on the said defendant.

Dan. Ch. Forms, p. 395, No. 993. *Supra*, p. 239 *et seq.*

No. 67.—*Notice of Motion or Summons (o) for leave to issue Writ of Attachment.*

[*Heading.*]

Let all parties / *or* / Take notice that } [*Formal parts as usual.*]

on the part of the plaintiff [*or as may be*] that he may be at liberty to issue a writ or writs of attachment against the defendant C. D. [*or as may be*] for his contempt in not [*here state the act required to be done or abstained from, and in respect of which contempt is alleged*] pursuant to the judgment [*or* order] dated the day of 18 . And that the said C. D. may be ordered to pay to the applicant his costs of this application, and also his costs of and incidental to the issuing and execution of the said writ or writs of attachment.

Seton, 1563. *Supra*, p. 244.

No. 68.—*Order for issue of Writ of Attachment (p).*

Whereas by the judgment [*or* order] dated &c., it was ordered [*recite direction for the act to be done*]. Now upon motion &c., by counsel for (the plaintiff) A., who alleged that (the defendant) B. has not &c. [*state default*], as by the affidavit of &c., filed &c. appears, and upon hearing counsel for (the defendant) B., and upon reading the said judgment [*or* order] the said affidavit [*enter evidence of service or substituted service of the judgment &c., and if the person in*

(*o*) As to procedure by summons in chambers, *vide supra*, p. 239.

(*p*) This form is available in cases of contempt, other than the non-payment of money.

contempt does not appear, and an affidavit of &c., filed &c., of service of notice of this motion upon the said (defendant) B.], this Court doth order that the said (plaintiff) A. be at liberty to issue a writ of attachment against the said (defendant) B. for his contempt in not &c. [*as above*]. And it is ordered that the said (defendant) B. do pay to the said (plaintiff) A. his costs of this application, and of the said attachment to be taxed by the taxing master.

No. 69.—*Order for issue of Writ of Attachment for non-payment of Money* (*q*).

Seton, 1565.
Supra, p. 244.

Whereas by the judgment [*or* order] dated &c., it was ordered that (the defendant) B. should within days after service thereof, pay to (the plaintiff) A. the sum of £ , as therein mentioned [*or* pay into Court to the credit of this cause &c., the sum of £ , by the chief clerk's certificate dated &c. certified to be due from him, on the account of &c. by the said judgment *or* order directed]. Now upon motion this day made unto this Court by counsel for the said (plaintiff) A., and upon reading the said judgment [*or* order], an affidavit &c. filed &c., of service of the said judgment [*or* order] upon the said (defendant) B.; an affidavit of the said (plaintiff) A. filed &c. of non-payment of the said sum of £ [*or*, *if so*, the Chancery Paymaster's certificate, whereby it appears that the said (defendant) B. has made default in payment of the said sum of £ into Court, pursuant to the said judgment *or* order]; an affidavit of &c. filed &c. of service of notice of the said motion on the said (defendant) B.; and it appearing to the satisfaction of the Court that the said (defendant) B. has made default in payment of the said sum of £ as directed by the said judgment [*or* order], and that such default is a default made by him as a trustee or person acting in a fiduciary capacity, and ordered to pay a sum in his possession or under his control within the meaning of the Debtors Act, 1869; this Court doth order that the said (plaintiff) A. be at liberty to issue an attachment against the said (defendant) B. for his contempt in not having paid the said sum of £ to the said (plaintiff) A. [*or* into Court] as aforesaid, pursuant to the said judgment [*or* order]; [*if so:* And it is ordered that the said (defendant) B. do pay to the said (plaintiff) A. his costs of this application and of the said attachment, such costs to be taxed &c.]

(*q*) This form is available only where the defaulting person owes the money in a fiduciary capacity.

Dan. Ch. Forms, p. 398, No. 1002. *Supra*, p. 249.

No. 70.—*Return of Attached and in Custody.*

I have attached the within-named C. D., whose body remains in Her Majesty's gaol for my county of , under my custody.

The answer of X. Y., Esquire, Sheriff.

Dan. Ch. Forms, p. 398, No. 1003. *Supra*, p. 249.

No. 71.—*Return of Cepi Corpus.*

I have attached tho within-named C. D., as within I am commanded, whose body I have ready.

The answer of X. Y., Esquire, Sheriff.

Dan. Ch. Forms, p. 398, No. 1004. *Supra*, p. 249.

No. 72.—*Return of Non est inventus.*

The within-named C. D. is not found in my bailiwick.

The answer of X. Y., Sheriff.

Ch. Forms, p. 438. *Supra*, p. 249.

No. 73.—*Return of Languidus* (*r*).

By virtue of this writ to me directed, I took the within-named C. D. at a dwelling-house situate at , in my county, but the said C. D. was then so sick and ill, and in so weak, infirm, and debilitated a state, that he could not be taken or removed from the said dwelling-house to the common gaol of my said county without great peril and danger of his life; and the said C. D., for the cause aforesaid, was kept and remained and continued, and still is kept and remains and continues, in my custody in the said dwelling-house so sick and ill, and in such a weak, infirm, and debilitated state as aforesaid, that I cannot, without peril and danger of his life, have his body before our said lady the Queen in the Division of the High Court of Justice, as I am within commanded.

Seton, 1572. *Supra*, p. 249.

No. 74.—*Order for Serjeant-at-Arms* (*s*).

Whereas by the judgment [*or* order] dated, &c., it was ordered, &c. [*recite the duty required to be performed*]. Now, upon motion,

(*r*) The returns to the writ of attachment are similar to those to the writ of *ca. sa.* As to the return of *languidus*, see *Jones* v. *Robinson*, 11 M. & W. 758; Wats. Sher. p. 196.

(*s*) This order is made only after a return of *non est inventus*. *Vide supra*, p. 249.

&c., by counsel, &c., who alleged that an attachment issued against the said (defendant) B. for not, &c. [*state the default*], directed to the sheriff of , and that the said sheriff hath returned *non est inventus* thereon; and upon reading the said judgment [*or* order], writ, and return: This Court doth order that the serjeant-at-arms attending this Court do apprehend the said (defendant) B., and bring him to the bar of this Court to answer his said contempt, and thereupon such further order shall be made as shall be just.

No. 75.—*Notice of Motion to Discharge Order for Issue of Attachment* (*t*). Dan. Ch. Forms, p. 404, No. 1022. *Supra*, p. 251.

[*Heading.*]

Take notice, &c., on behalf of the (defendant) B. [*if so*, a prisoner in the custody of the governor of Holloway Prison [*or as may be*] under a writ of attachment, issued pursuant to order dated the day of , 18], that the said order may be discharged, and the said writ of attachment set aside, on the ground that [*here state particularly the alleged irregularity* (*u*)], and that [*if so*, the defendant may be discharged out of custody as to his said contempt]: And that the (plaintiff) A. may be ordered to pay to the (defendant) B. his costs of and relating to the said order and the said attachment and consequent thereon, and of this application; such costs to be taxed.

No. 76.—*Discharge of Order for Issue of Writ of Attachment.* Seton, 1595. *Supra*, p. 251.

Whereas by an order dated, &c. [*recite order for issue of writ*]. Now, upon motion, &c., of counsel for the (defendant) B., who alleged that a writ of attachment was pursuant to the said order issued against the said (defendant) B., and directed to the sheriff of , [*if so*, and it appears, by the return of the said sheriff to the said writ, that the said B. is a prisoner in his custody] for not, &c. [*state default for which the process issued*], and that the said order [*if so*, and writ of attachment] are irregular: And upon hearing counsel for the (plaintiff) A., and upon reading the said order and return, an affidavit of, &c., filed, &c. [*if so*, and an

(*t*) It is now the *order* which may be discharged; formerly, when attachment issued without leave, it was frequently the *writ* only which might be set aside.

(*u*) This is necessary by the express provision of O. LXX. r. 3.

affidavit of service of notice of this motion to the said (plaintiff) A.]: This Court doth order that the said order dated, &c., be discharged [*if so*, and that the writ of attachment issued in pursuance thereof be set aside, and that the said (defendant) B. be discharged out of custody as to his said contempt].

Dan. Ch. Forms, p. 399, No. 1009.
Supra, p. 253.

No. 77.—*Application for Habeas Corpus by Contemnor.*

[*Heading.*]

Take notice, &c., on behalf of the defendant B. [*or as may be*], who is now a prisoner in the custody of the sheriff of [*or* of the governor of Holloway Prison, *or as may be*], under an attachment issued against him for his contempt in not [*state default*], pursuant to the judgment [*or* order], dated the day of , 18 , that a writ of *habeas corpus cum causis* may issue directed to the said sheriff [*or* to the governor of Holloway Prison, *or as may be*], at the return thereof, to bring the applicant to the bar of this Court.

Supra, p. 253.

No. 78.—*Præcipe for Writ of Habeas Corpus.*

[*Heading.*]

Seal a writ of habeas corpus directed to the sheriff of [*or as may be*], to bring the defendant, C. D., to the bar of this Court, before Mr. Justice , on , the day of , 18 .
Order to issue the writ dated the day of , 18 .

[*Name, &c., of solicitor or party issuing the writ.*]

Supra, p. 253.

No. 79.—*Writ of Habeas Corpus.*

[*Heading.*]

Victoria, &c.

To the sheriff of [*or*, to the keeper of our prison of , in the county of , *or as may be*] greeting.

We command you that you do, on , the day of , 18 , bring before us in the Chancery Division of our High Court of Justice the body of B., by whatsoever name, or addition of

name, he is known or called, who is detained in [*state place of custody, as*, the prison of W., in the said county of], in your custody, together with an account of the cause or causes of his being taken into and detained in custody, to perform and abide such order as our said Court shall make in this behalf; and hereof fail not, and bring this writ with you.

Witness, , Lord High Chancellor of Great Britain, the day of , in the year of our Lord One thousand eight hundred and eighty- .

No. 80.—*Notice of Motion for Discharge from Custody.*

Dan. Ch. Forms, p. 403, No. 1020. *Supra*, p. 254.

[*Heading.*]

Take notice, that, &c., on the part of the defendant, C. D., that he may be discharged out of the custody of the governor of Holloway Prison [*or as may be*], as to his contempt in not [*here specify the act required to be done or abstained from*], pursuant to the judgment [*or* order] made in this action, and dated the day of , 18 .

No. 81.—*Order to Discharge Prisoner in Custody on his Compliance.*

Seton, 1593. *Supra*, p. 254.

[*Heading.*]

Upon motion, &c., by counsel for (the defendant) B., who alleged that the said B. is a prisoner in [Holloway] prison, in the custody of the sheriff of , under an attachment issued against him pursuant to the order dated, &c., for his contempt in not [*state the default*], and that the said (defendant) B. hath since [*state the compliance*], and upon hearing counsel for the plaintiff, and upon reading [*if so*, an affidavit of, &c., filed, &c., of service of notice of this motion upon the plaintiff—*recite any other evidence*]: This Court doth order that the said (defendant) B. be discharged out of the custody of the said sheriff as to his said contempt. And it is ordered that the said (defendant) B. do pay to the (plaintiff) A., his costs of this application, to be taxed, &c.

Seton, 1594.
Supra, p. 254.

No. 82.—*Order of Discharge from Custody on Payment of Sum on Account of Costs* (*x*).

[*Heading.*]

Upon motion, &c., by counsel for the defendant, B., who alleged that the defendant, B., has been, by virtue of the order dated, &c., a prisoner in [Holloway] prison since the day of , for his contempt in the said order mentioned, and that he hath apologised for such contempt, as by his affidavits filed this day appears; and upon hearing counsel for the plaintiffs, and upon reading the said order and affidavits: This Court doth order that the defendant, B., do pay to Messrs. , the plaintiffs' solicitors, the sum of £ , on account of their costs of the said order, dated, &c., and of this application. And it is ordered that upon such payment being made the defendant, B., be discharged out of custody (as to his said contempt) (*y*). And it is ordered that the costs of and relating to the said order and consequent thereon, and of this application, be taxed, &c., the plaintiffs by their counsel undertaking to refund to the defendant, B., the excess, if any, in case such costs when taxed shall amount to less than the sum of £ , to be paid on account thereof. And it is ordered that the defendant, B., do pay to the plaintiffs the amount of their taxed costs, if any, beyond the said sum of £ .

Dan. Ch. Forms, p. 401, No. 1013.
Supra, p. 261.

No. 83.—*Notice of Motion for Committal to Prison for Contempt.*

[*Heading.*]

Take notice that, &c., on the part of the plaintiff, that the defendant B. may stand committed to Holloway Prison for [*here state the contempt complained of*] (*z*), pursuant to the judgment [*or* order] made in this action, and dated the day of , 18 : And that the said defendant may be ordered to pay to the applicant his costs of and incidental to this application, and the order to be made thereon.

(*x*) This and the preceding precedent are taken from Seton, where several other forms will be found.

(*y*) The discharge should be limited to the particular contempt in question, because there may be other causes of detention.

(*z*) Where the contempt is breach of an injunction, the order must be recited.

No. 84.—*Order of Committal for Special Contempt.*

Seton, 1587.
Supra, p. 261.

[*Heading.*]

[*Recite application to the Court and evidence whereby it appeared that the contempt in question was committed, care being taken to describe in what particularly the contempt consisted.*] And this Court being of opinion that the defendant [*or as may be*] has by such conduct been guilty of contempt of this Court (*a*), doth order that the said defendant [*or as may be*] do stand committed to [Holloway] Prison for his said contempt (*b*).

No. 85.—*Warrant to Tipstaff to arrest Person committed for Contempt* (*c*).

Dan. Ch. Forms, p. 398. No. 1006. *Vide supra*, pp. 262, 263.

Whereas by an order bearing date the day of , 18 , made by his lordship Mr. Justice in a certain action wherein A. is plaintiff and B. is defendant, it was ordered that [*copy essential part of order for committal*]: These are, therefore, in pursuance of the said order to will and require you forthwith upon receipt hereof to make diligent search and inquiry after the body of the said , and wheresoever you shall find him to arrest and apprehend him, and bring him to the bar of this Court to answer his contempt in the said order mentioned, willing and requiring all and singular mayors, sheriffs, justices of the peace, bailiffs, constables, jailors, headboroughs, and all other Her Majesty's officers and loving subjects, to be aiding in the execution of the premises as they tender Her Majesty service, and will answer the contrary at their peril, and this shall be your warrant.

Dated this day of , 18 .

———, Chancellor.

To Mr. , the tipstaff attending the Chancery Division of the High Court of Justice, *or his deputy*.

(*a*) It is an essential part of the order that the Court should appear therein to have adjudicated upon the question whether or not there was in fact a contempt. This is best done, in the manner suggested in the form, by setting out the material effect of the evidence. *Vide supra*, p. 261.

(*b*) For form of order of committal at common law, *Reg.* v. *Hemsworth*, 3 C. B. 745.

(*c*) See an almost identical form in *Green* v. *Elgie*, 5 Q. B. 99.

R. S. C., App. G., No. 6.

No. 86.—*Præcipe for Writ of Sequestration.*

188 . B. No. .

In the High Court of Justice,
Chancery Division,
[*name of judge*].
Between A. B. . . . . Plaintiff,
and
C. D. and others . . . Defendants.

Seal a writ of sequestration against C. D. for not [*here describe the default*] at the suit of A. B. directed to [*here insert the names of the commissioners*].

Judgment [*or* Order] dated day of 18 .

Dated day of , 18 .

[*Name and address of solicitor or party issuing the writ.*]

R. S. C., App. H., No. 13.
Supra, Book II., Chap. IV.
Vide p. 270.

No. 87.—*Writ of Sequestration.*

[*Heading.*]

Victoria, by the grace of God, &c. To [*names of not less than four commissioners*], greeting:

Whereas lately in the Division of our High Court of Justice, in a certain action there depending wherein A. B. is plaintiff and C. D. and others are defendants [*or*, in a certain matter there depending, intituled "In the matter of E. F." *as the case may be*], by a judgment [*or* order, *as the case may be*] of our said Court made in the said action [*or* matter], and bearing date the day of , 18 , it was ordered that the said C. D. should [pay into Court to the credit of the said action, the sum of £ , *or as the case may be*]: Know ye, therefore, that we, in confidence of your prudence and fidelity, have given and by these presents do give to you, or any three or two of you, full power and authority to enter upon all the messuages, lands, tenements, and real estate whatsoever of the said C. D., and to collect, receive, and sequester into your hands not only all the rents and profits of his said messuages, lands, tenements, and real estate, but also all his goods, chattels, and personal estate whatsoever; and therefore we command you, any three or two of you, that you do at certain proper and convenient days and hours go to and enter upon all the messuages, lands, tenements and real estate of the said C. D., and that you do collect, take, and get into your hands not only the rents and profits of his said real estate, but also all his goods, chattels and personal estate, and retain and keep the same under sequestration in your hands

until the said C. D. shall [pay into Court to the credit of the said action the sum of £ , *or as the case may be*] clear his contempt, and our said Court make other order to the contrary.

Witness, &c.

No. 88.—*Motion Paper for a Sequestration.* *Supra*, p. 272.

[*Heading.*]

Take notice that, &c., on behalf of the (plaintiff) [*or as the case may be*], on the sheriff's return to an attachment for leave to issue a sequestration against the (defendant) B. for breach of the judgment [*or* order], dated the day of , 18 , whereby the said (defendant) was ordered to [*here state substance of contempt complained of*]. The judgment [*or* order] and sheriff's return accompany.

Dated the day of , 18 .

No. 89.—*Notice of Motion or Summons for leave to issue Sequestration against Corporation.* Dan. Ch. Forms, p. 405, No. 1024. *Supra*, p. 272.

[*Heading.*]

Take notice that, &c., on the part of the plaintiff [*or as may be*], that he may be at liberty to sue out a writ of sequestration directed to commissioners to be therein named, to sequester the goods, chattels, and personal estate, and the rents, issues, and profits of the real estate of the defendants, the company, for contempt of this court committed by the said defendants, the company, in wilfully disobeying the judgment [*or* order] of this Court, dated the day of , 18 , whereby the said defendant company was ordered to [*set out the part of the judgment or order whereof disobedience is alleged*], and that the costs of this application be paid by the defendants, the company.

Dated the day of , 18 .

No. 90.—*Notice of Motion or Summons for Examination Pro Interesse suo.* Dan. Ch. Forms, p. 412, No. 1043. *Supra*, p. 278.

[*Heading.*]

Take notice that, &c., on the part of G. H., of [*residence and addition*], that an inquiry may be made, whether the said G. H.,

has any and what interest in the real and personal estate [*or as may be*] sequestered by [*the names of the sequestrators*], the sequestrators acting under the writ of sequestration issued in this action, on the day of , 18 , against the defendant, C. D., or in any and what part thereof.

Dated the day of , 18 .

Seton, p. 1583. *Supra*, p. 278.

No. 91.—*Order for Examination pro interesse suo.*

[*Heading.*]

Upon motion, &c., by counsel for S., of &c. [*claimant*], and upon hearing counsel for the plaintiffs and for the defendant, and upon reading, &c. [*enter any evidence*]. This Court doth order that an inquiry be made whether the said S. hath any and what interest in the lands and hereditaments specified in the schedule to the return to the commission of sequestration issued in this cause [action], and other the real estates comprised in the indentures, &c. [*describe the property*], sequestered by, &c., the sequestrators acting under the said commission of sequestration, or any and what part thereof. And it is ordered that this motion do stand over until after the chief clerk shall have made his certificate of the result of the said inquiry (but this order is to be without prejudice to any question as to the rents of the said lands) (*d*). Liberty to apply.

Seton, p. 1564. *Supra*, pp. 281, 298.

No. 92.—*Declaration that Claimants have an Interest against which Sequestrators cannot hold:—Order to Withdraw* (*e*).

[*Heading.*]

Upon the application of, &c. [*claiming as mortgagees*], to vary the chief clerk's certificate adjourned into Court, and upon the ad-

(*d*) This is one of a series of four orders made in the suit of *Alton* v. *Harrison*, and set forth in Seton, pp. 1583 *et seq.* In that case the claimant, *pro interesse suo*, established his claim, and, after an interim order protecting the property in his hands pending the inquiry, the sequestrators were ordered to withdraw. See next Form.

(*e*) See note to preceding Form. It is not proposed to give further precedents or forms of orders on applications *pro interesse suo*. Each case is governed by its peculiar circumstances, and on them depend in a great measure the particular orders which will be made, *e. g.*, for protection of the sequestered property, injunctions against interfering with possession of the sequestrators, &c. A form of order for withdrawal will be found, *Walker* v. *Bell*, 2 Mad., p. 21. In some cases an inquiry as to damages will be ordered: *Copeland* v. *Mape*, 2 Ba. & Be. 66.

journed motion, &c.: Let the said certificate, so far as it is thereby certified that the applicants have not any interest in the several goods, chattels, &c., and articles of personalty in and about the house, &c., situate, &c., sequestered by the said sequestrators, nor in the lands and hereditaments comprised in the indenture dated, &c., be varied. And declare that the said [*claimants*] have under and by virtue of the said indenture an interest in the said several goods, &c., and articles of personalty, lands and hereditaments, against which the said sequestrators cannot hold. And let the said sequestrators withdraw from the possession of the said several goods, &c., and articles of personalty, and from the possession and receipt of the rents and profits of all such parts of such lands and hereditaments of which they are in possession, or in receipt of the rents and profits, and they are not hereafter to receive any further rents. Costs of claimants of this and their former applications, and of the reference to be added to the amount due to them under their security; such costs to be taxed, &c.

No. 93.—*Notice to Tenant to Attorn.*

Dan. Ch. Forms, p. 410, No. 1037. *Vide supra*, p. 282.

[*Heading.*]

We, X. Y. and T. Z., the sequestrators acting under the sequestration issued in this action on the day of , 18 , against the property of the defendant, C. D., hereby give you notice and require you to attorn and become tenant to us for [*describe the property; as thus:* All that farm called the Bourne, situate at , in the county of], and for such other part or parts of the real estate of the said C. D. as is or are in your occupation, and to pay to us your rent in arrear, and growing rent, for the said premises.

Dated this day of , 18 .

X. Y.
T. Z.

To G. H., of [*residence and addition*].

No. 94.—*Attornment thereon.*

Dan. Ch. Forms, No. 1038. *Supra*, p. 282.

[*Heading.*]

I, G. H., of [*residence and addition*], attorn and become tenant to X. Y. and T. Z., the sequestrators acting under the sequestra-

tion issued in this action on the day of , 18 , against the property of the defendant, C. D., for All that [*describe the property; see description in last form*], with the appurtenances, as the same are now in my occupation, To hold the same at and under the same rent and subject to the same covenants and conditions as I now hold the same: and I have this day paid to the said X. Y. and T. Z. the sum of (one shilling) for and on account and in part payment of the said rent.

Dated this day of , 18 .

G. H.

Witness,

L. M., of [*residence and addition*].

Dan. Ch. Pr., p. 410, Form No. 1039. *Supra*, p. 282.

No. 95.—*Notice of Motion or Summons for Tenant to Attorn.*

[*Heading.*]

Take notice, &c. } *as usual.*
Let all parties, &c. }

on the part of the plaintiff [*or as the case may be*], that G. H., of [*residence and addition*], may be ordered within (eight) days after service to attorn and become tenant for the [*describe the property*], and to pay his rent in arrear, and growing rent, for the same to X. Y. and T. Z., the sequestrators acting under the sequestration issued in this action on the day of , 18 , against the defendant, C. D.

Dated this day of , 18 .

Dan. Ch. Forms, p. 411, No. 1040. *Supra*, p. 282.

No. 96.—*Affidavit in Support.*

[*Heading.*]

1. [*Prove service of notice to attorn.*]

2. [*If service was personal, prove production of the sequestration, as thus*]: at the time of the service aforesaid of the said notice, I showed to the said [*tenant's name*] the writ of sequestration in the said notice mentioned or referred to, and which said writ appeared to me to have been regularly issued out of and to be under the seal of the Central Office of this Honourable Court.

[*Or, if the service was not personal, prove service of the sequestration, as thus*]: at the time of the service aforesaid of the said notice, I served the said [*tenant's name*] with the writ of sequestration therein mentioned or referred to, and which appeared to me to have

been regularly issued out of and to be under the seal of the Central Office of this Honourable Court, by delivering to and leaving with the said [*state whom*] a true copy of the said writ, and of the indorsement thereon; and I at the same time showed to the said [*state whom*] the said writ so under seal as aforesaid.

3. [*Prove service of the notice of motion or summons to attorn.*] Sworn, &c.

No. 97.—*Order for Tenants to Attorn to Sequestrators.* Seton, p. 1581. *Supra*, p. 282.

[*Heading.*]

Upon motion, &c., by counsel for the plaintiffs, who alleged that a commission of sequestration issued on, &c., against the defendant directed to [*here insert the names of the sequestrators*], authorizing them, or any two of them, to enter upon all the real estate of the defendant, and to collect, receive, and sequester into their hands all the rents and profits thereof; and that, pursuant to the said commission of sequestration, A. and B., two [*or as the case may be*] of the commissioners therein named, entered upon all the lands comprised in the said real estate, and situate, &c., and in the holding of, &c., who refuse to attorn tenants to the said commissioners, as by the return of the said commissioners of sequestration now produced and read appears [*or, if the fact appears otherwise, e.g. by affidavit, set forth effect of evidence*]: and upon reading an affidavit of, &c., of service of notice of this application on the said [*tenants*], [*or*, and upon hearing counsel for the said [*tenants*]]: This Court doth order that the said [*tenants*] do within days after service of this order attorn to and become the tenants of the said [A. and B.], the said commissioners of sequestration, and pay their rents in arrear, and growing rent, to the said commissioners until further order.

No. 98.—*Order for Sequestrators to account and arrange Claims for Dilapidation, and Tenant Right.—Application of Proceeds.* Seton, p. 1580, No. 2. *Supra*, p. 283.

[*Heading.*]

Upon the application of the plaintiff, and upon hearing the solicitors for the applicant for the defendant B., and for D., the trustee in bankruptcy of the said defendant, and upon reading, &c.: "Let the sequestrators, acting under the commissions of sequestration issued in this cause and dated, &c. sell, at such convenient time or times as they may determine upon (but so that such sale be carried out on or before the day of), all the goods, furniture,

plate, chattels, stock, implements, and personal estate of the defendant B. sequestered by them, and now remaining in their possession; And let them also settle and arrange with the incoming tenant as to the amount to be paid by him in respect of the tenant rights upon the defendant's farm, and receive such amount and give a discharge for the same, and also settle with the landlord, or his incoming tenant, all (if any) claims for dilapidations in and about the farmhouse, buildings, and lands, occupied by the defendant; And let an account be taken of the moneys received and paid by the said sequestrators under and by virtue of the said commissions, including the moneys to be received or paid in pursuance of the directions hereinbefore contained; And let, &c. [*names*], as such sequestrators, within days after the filing of the chief clerk's certificate, pay into Court to the credit of this cause, &c., 'the sequestration account,' the balance which shall be certified to be due from them on taking the said account; And let the taxing master tax the costs (as between solicitor and client) of the plaintiff and defendant, and the costs, charges, and expenses of the said sequestrators properly incurred of and relating to the execution of the said commissions of sequestration, including a proper allowance to them for their time and trouble": [Direction for payment of such costs, &c., out of the proceeds when paid in:] "And let thereout also the sum of £ , mentioned in the said sequestration dated, &c., and the sum of £ , mentioned in the said sequestration dated, &c., making altogether the sum of £ , be carried over to the credit of this cause, &c.; "And let thereout also the sum of £ , mentioned in the said sequestration dated, &c., be paid to the plaintiff, and the residue of such money be paid to D., as the trustee in bankruptcy of the said defendant B."

Seton, p. 1579, No. 1.
Supra, p. 283.

No. 99.—*Order for Sequestrators to Sell and Pay in Proceeds—Taxation and Payment of Costs—Power to remove Effects Saleable and Unsaleable.*

[*Heading.*]

"Upon the application of D., &c. [*names*], the sequestrators acting under the sequestration issued in this action on the day of , against the defendant H., and of the plaintiffs; and upon hearing the solicitors for the applicants, and for the defendant H.; and upon reading the order dated, &c., an affidavit of, &c., filed, &c.: Let the said [*names*], the sequestrators acting under the said commission, or any two or three of them, be at liberty to sell,

or cause to be sold, either by public auction or private contract, the household furniture, goods, chattels, and personal estate of the said H., now at his residence situate, &c., and also all the share and interest of the said H., as partner with one J., of and in all the book debts, materials, tools, implements, goods, chattels, personal estate, goodwill, and stock-in-trade, used in the partnership business of, &c., carried on by the said H. and J. at, &c., aforesaid, under the style or firm of J. and H., all of which household furniture, goods, chattels, personal estate, and property are now under the control of the said sequestrators, and that for the purpose aforesaid the said sequestrators, or any three or two of them, be at liberty to remove the same household furniture, goods, chattels, personal estate, and property from the said residence and place of business of the said H., or elsewhere soever the same may have been deposited by him or on his behalf, to any convenient place in the discretion of the said sequestrators." Sequestrators to pay proceeds into Court, and the costs of executing the writ to be taxed, and paid thereout to their solicitors, and the balance to be invested. "And let the said sequestrators, or any three or two of them, be at liberty to remove all unsaleable effects and property of the said H. from his said residence and place of business, or elsewhere soever the same may have been deposited by or on behalf of the said H., to a convenient place under the control of the said sequestrators."

No. 100.—*Order for Discharge of Sequestrators* (*f*). Seton, p. 1586. *Supra*, p. 292.

[*Heading.*]

Upon the application of, &c., and all parties by their solicitors consenting to the following order [discharge, attachment, *where it has been issued*, and] dissolve sequestration issued against the defendant S., on, &c., for not, &c. And let the costs of the plaintiff and of the sequestrators [of and incidental to the attachment, and, *where necessary*] the costs, charges, and expenses of and incidental to the sequestration, including their costs of the application by the mortgagees for the order dated, &c. (for inquiry *pro interesse suo*), and all usual and proper allowances to the sequestrators in respect of their office, and of this application, and of and incidental thereto, be taxed (as between solicitor and client) in case the parties differ, and be respectively retained and paid by the sequestrators as there-

(*f*) This is a usual order, but is, of course, variable. The order was made in the case of *Rawlinson* v. *Stringer*, referred to Seton, 1586.

inafter mentioned. And let , &c., the said sequestrators, withdraw from possession of the said estate of the defendant S., situate at, &c., and from the receipt of the rents and profits thereof, within [*time limited*] from the service of this order, and within the time aforesaid give notice of their withdrawal (to the tenants), and be paid their costs thereof (to be taxed as between solicitor and client), and included in the costs hereinbefore directed to be taxed and retained. Sequestrators to leave accounts in chambers, and to retain their costs, and costs, charges and expenses, when taxed or agreed to, out of the monies in their hands; and, the mortgagees consenting, and abandoning the inquiry as to their interest directed by the said order, sequestrators to pay what shall be found due from them on the balance of their account to defendant S. within [*time limited*], and thereupon the sequestrators to be released and discharged from all liability in respect of their office.

Dan. Ch. Forms, p. 719, No. 1678. *Supra*, p. 313.

No. 101.—*Motion Paper by Judgment Creditor for appointment of a Receiver by way of equitable Execution.*

[*Heading.*]

Take notice that, &c., on behalf of the plaintiff, that the plaintiff [*or* L. M., of, &c.], or some other proper person, may be appointed receiver, by way of equitable execution, of the rents and profits of the properties of the defendant C. D. in the indorsement on the writ of summons [*or* in the affidavit of J. S., filed the day of , 188 , *or as may be*] mentioned, with all usual directions.

An affidavit in support accompanies.

Dan. Ch. Forms, p. 720, No. 1679. *Supra*, p. 313.

No. 102.—*Summons to proceed on Order directing a Receiver to be appointed.*

[*Heading.*]

Let all parties, &c., on the part of the plaintiff [*or as may be*], to proceed on the judgment [*or* order] dated , 188 ; and that L. M., of [*residence and addition*], or some other proper person, may be appointed receiver pursuant thereto.

No. 103.—*Form of Affidavit in support of Application for Receiver.* *Supra*, p. 314.

[*Heading.*]

I (*g*), , of , make oath and say as follows:—

1. By a judgment [*or* order] of this Honorable Court, dated the day of , 18 , it was adjudged that the above-named plaintiff should recover against the above-named defendant £ and costs, which costs were afterwards taxed and allowed at £ [*or, in the case of an order*, it was ordered that the above-named defendant should pay to the above-named plaintiff the sum of £ , &c.].

2. The said sum of £ is still due upon the said judgment [*or* order], and the above-named plaintiff has received no manner of satisfaction therefor [*or if the amount has been reduced either by payment or a levy of part under a fi. fa., such circumstance should be set forth so as to show the sum actually due*].

3. [*It should always appear that the debtor has no property available for execution by the ordinary means. It is true that this is not absolutely essential, vide supra, Book III. Chap. I. sect.* 3, *but it is a most material element in guiding the judge as to the exercise of his discretion. It is submitted that it is, strictly, not sufficient to set forth the fact simply on information and belief, unless the source of information is disclosed. Examples of the kind of evidence which may be required upon this point are as follows:—*

On the day of , 18 , the said plaintiff sued out a writ of *fieri facias* upon the said judgment [*or* order] directed to the sheriff of , but as I am informed by the said sheriff or his officers and believe it has been unproductive and useless by reason that the defendant had no goods or chattels whereon it could be executed:—

The said defendant resides at , and on the day of I proceeded to his said residence, and was informed by that the said defendant was only a lodger, and had no property upon the said premises, and I believe that it is useless to issue against him any writ of execution for the reason that he has no property available thereunder. *The solicitor's clerk having knowledge of the matter might, for example, depose that he could not direct the sheriff to any property available under a writ.*]

4. The said defendant is possessed of or entitled to [*state the property particularly, as for example:—*]

(*g*) It is not necessary that the plaintiff should make this affidavit. It may be made by any person who can depose to the facts.

The six houses known as Beauchamp's Terrace, High Street, Bedford [*or* the field or close of land known as the Way Piece, situate at in the county of], which said houses are [*or* field is] of the value of £ or thereabouts, and produce [*or* produces] the annual rent of £ or thereabouts. The said premises are subject to a mortgage or charge [*where possible state amount and particulars, but if these facts cannot be definitely ascertained general information and belief will often be sufficient, specially if the fact that the defendant is in possession and is paying the interest on the mortgage or charge, and the outgoings, can be deposed to.*]

5. [*It is also advisable to state in whom the legal estate is vested, for although it is competent to the Court to appoint a receiver in respect both of legal and equitable estate, it is not usual to do so; vide supra,* p. 321. *This paragraph should therefore run :*—]

The said premises are, under and by virtue of the said mortgage, now vested in , the mortgagee thereof, and the said premises are not therefore available under a writ of elegit.

[*Or where the charge is merely an equitable charge, not a legal mortgage :*] By reason of the said premises being subject to the said charge it would be expensive and inconvenient for the said plaintiff to attempt to have recourse thereto by issuing a writ of elegit.

6. It is just and convenient that this Honorable Court should appoint a receiver, as and by way of equitable execution, in respect of the interest of the said defendant in the said premises, to receive the rents and profits thereof, both as to such rents and profits as have accrued and are already due, and such as shall accrue and become due, but without prejudice to the rights of the said [*mortgagee*] or of any other incumbrancer prior to the order appointing such receiver, and as regards any incumbrancer who may be in possession without prejudice to such possession.

7. [*It is always advisable to state special grounds of urgency where they exist, as for example, that the defendant is pressed by creditors or negotiating for the sale of his property. The following form is suggested in* Ch. Forms, *p.* 451, *but, it is submitted, is not according to present practice necessary :*—]

The defendant is in pecuniary difficulties, and it is of the utmost importance that an interim receiver should be appointed immediately, and without any delay to be caused by such receiver giving security (*h*), and without previous notice to the defendant; and unless such receiver be so appointed and equitable execution obtained in manner aforesaid, I verily believe that the defendant, by assigning his estate or interest in the said premises on receiving notice of

(*h*) This clause is clearly unnecessary. *Vide supra*, p. 316.

my application for the appointment of such receiver, will deprive me of the benefit of the said judgment, and that I shall otherwise lose the benefit thereof.

8. R. R. [*proposed receiver*] is in my judgment a fit and proper person to be appointed such receiver as aforesaid.

Sworn, &c.

No. 104.—*Affidavit of fitness of proposed Receiver.*

[*Heading.*]

Dan. Ch. Forms, p. 721, No. 1682.

I , of , make oath and say as follows:

1. I have for years past known and been well acquainted with , of [*residence and addition*], the person proposed to be appointed in this action, the receiver of the rents and profits of [*set forth so far as necessary the order asked for, and describe the property intended to be comprised in the appointment.*]

2. The said is [*state the business, trade or profession of the proposed receiver, and the place where carried on, and for how long, to deponent's knowledge*].

3. The said is a person of respectability and integrity, and of good credit, and in my judgment is a fit and proper person to be appointed receiver of the said rents and profits in manner aforesaid.

No. 105.—*Order appointing Receiver on Application of a Judgment Creditor.*

[*Heading.*]

Seton, p. 414, No. 12. Ch. Forms, p. 452. *Supra*, pp. 314, 325.

Upon hearing, &c.: Let be appointed receiver to receive (*i*) the rents and profits of [*describe the property*]. And let such receiver, on or before the day of , 18 , give security to be approved of by the chief clerk [*or* one of the masters]. The appointment of the said receiver is to be without prejudice to the rights of any prior incumbrancer, and if any prior incumbrancer is in possession, then without prejudice to such possession; and the tenants of the said real estate are, subject as aforesaid, to attorn and pay their rents in arrear, and growing rents, to such receiver. And let such receiver, out of the rents and profits to be received by him, keep down the interest upon the prior incumbrances according

(*i*) Where the judgment is not sufficient to justify the receiver's acting in the ordinary manner, but is yet of sufficient amount to justify the appointment, a provision is inserted in the order "that such receiver do not take actual possession without the leave of the Court." *Vide supra*, p. 314, n. (*q*).

to their priorities, and be allowed the same on passing his accounts, and let such receiver from time to time pass his accounts [to the satisfaction of one of the masters, *or* of the district registrar (*k*)], and apply any balance in his hands in or towards payment and satisfaction to the plaintiff of what shall for the time being be due to him in respect of the judgment signed [*or* order made] in this action on the day of for the sum of £ , debt, and £ for costs, making together the sum of £ . And any of the parties are to be at liberty to apply as there may be occasion. And the costs of and incident to this application are to be added to the amount of the judgment debt and paid by the receiver in manner aforesaid accordingly (*l*).

Dan. Ch. Forms, p. 729, No. 1693.
Supra, p. 318.

No. 106.—*Notice to Tenant to Attorn to Receiver.*

[*Heading.*]

I, L. M., of [*residence and addition*], the receiver appointed in this action of the rents and profits of the real estate of A. B., the testator in the writ of summons in this action named [*or as may be*], hereby give you notice, and require you to attorn and become tenant to me for [*describe the property; as thus:* the messuage or tenement, garden and outbuildings, with the appurtenances, now occupied by you, and situate at A., in the county of B.,], and for such other part or parts of the said real estate as is or are in your occupation; and to pay to me your rent in arrear, and growing rent, for the said premises. Dated this day of , 188 .

L. M.

To W. P., of [*residence and addition*].

Dan. Ch. Forms, p. 729, No. 1695.
Supra, p. 319.

No. 107.—*Notice of Motion or Summons for Tenant to Attorn, and pay Rent.*

[*Heading.*]

Take notice that, &c. [*or*, Let all parties, &c.], on the part of the plaintiff [*or as may be*], that W. P., of [*residence and addition*], may be ordered, within seven days after service, to attorn and become tenant to L. M., the receiver appointed in this action, for or in

(*k*) This is necessary when the appointment is made in the Queen's Bench Division.

(*l*) An alternative order as to costs is: "And the costs of this order and of the receivership shall be paid out of the money to be received by the receiver by virtue of such receivership, but shall not be added to the judgment debt against the judgment debtor." Ch. Forms, p. 452. The form in the text is preferable.

respect of the [*describe the property : see* Form, No. 93, *supra*], now occupied by the said W. P.; and to pay his rent in arrear, and growing rent for the same, to the said L. M.

No. 108.—*Notice of Motion or Summons for an Examination pro interesse suo.*

Dan. Ch. Forms, p. 730, No. 1698.
Supra, p. 318.

[*Heading.*]

Take notice that, &c. [*or*, Let all parties, &c.], on the part of G. H., of [*residence and addition*], that an inquiry may be made, whether the said G. H. has any and what interest in the real estate [*or as may be*] taken possession of by L. M. as the receiver appointed in this action, or in any and what part thereof.

No. 109.—*Receiver's Recognizance* (Ord. L. r. 16).

R. S. C., App. L., No. 21.

[*Name of receiver*] of ; [*name of first surety*] of ; and [*name of second surety*] of .

Before our Sovereign Lady the Queen in her High Court of Justice personally appearing, do acknowledge themselves, and each of them doth acknowledge himself to owe to [and , two of the chief clerks of the Chancery Division (*m*)] the sum of £ , to be paid to the said and , or one of them, or the executors or administrators of them, or one of them, and unless they do pay the same they the said do grant, and each of them doth grant for himself, his heirs, executors and administrators, that the said sum of £ shall be levied, recovered, and received of and from them, and each of them, and of and from all and singular the manors, messuages, lands, tenements and hereditaments, goods and chattels of them and each of them wheresoever the same shall or may be found. Witness our said Sovereign Lady, Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, and so forth, at the Royal Courts of Justice, the day of , 18 .

Whereas, by an order of the High Court of Justice made in a cause wherein are plaintiffs and defendants, and dated the

Mr. Justice , the judge to whose Court this cause is attached, has approved of and allowed this recognizance.
, Chief Clerk.

——— *v.* ———.

(*m*) This is, of course, different when the receiver is appointed in the Queen's Bench Division; there, the recognizance is entered into with two of the masters. In a district registry it should be made with the district registrar or registrars.

day of , it was ordered (*n*) that a proper person should be appointed to receive [*or*, that upon the above-bounden first giving security, he should be appointed receiver of] the rents and profits of the real estate, and to collect and get in the outstanding personal estate of in the said order named. And whereas the judge to whom this cause is assigned [*or the person, master, or district registrar named in the order*] hath [*approved of the said as a proper person to be such receiver*], and hath approved of the above-bounden and as sureties for the said , and hath also approved of the above-written recognizance with the underwritten condition as a proper security to be entered into by the said and , pursuant to the said order and the general orders of the said Court in that behalf; and in testimony of such approbation the chief clerk of the said judge [*or as may be*] hath signed an allowance in the margin hereof.

Now the condition of the above-written recognizance is such that if the said do and shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the real estate, and in respect of the personal estate of the said [*or in the case, as here, of a receiver appointed by way of equitable execution*, of the rents and profits of, *describing the property*], at such periods as the said judge [*or as may be*] shall appoint, and do and shall duly pay the balances which shall from time to time be certified to be due from him, as the said Court or judge hath directed or hereafter direct, then the above recognizance shall be void and of none effect, otherwise the same is to be and remain in full force and virtue.

Taken and acknowledged by the above-named, &c.

(*n*) This is the form given in the Appendix to the Rules of the Supreme Court, but if the order follows the form suggested above, No. 105, the recognizance should here follow: "that R. R. should be appointed receiver to receive the rents, &c. [*recite order*], and that he should, on or before , give security, to be approved of by , &c. [*as in the order*]."

No. 110.—*Summons for Charging Order over Stock* (*o*).

18 . B. No. .

In the High Court of Justice,
Division.
[*When in Chancery Division name of Judge.*]

Supra, p. 336.

Between A. B. . . . . Plaintiff.
and
C. D. . . . . Defendant.

And in the matter of an Act passed in the Session held in the first and second years of the reign of her present Majesty, chapter 110, and of the Act passed in the Session held in the third and fourth years of the reign of her present Majesty, chapter 82 (*p*).

Take notice, &c.
or,
Let all parties, &c.

} on the part of A. B., of [*address and description*], that the sum of £ [*describe stock*] standing in the books of the Governor and Company of the Bank of England [*or* the shares standing in the books of *the particular public company*], in the name of C. D., of [*address and description*], in his own right [*or as the case may be* (*vide infra, form of affidavit, No.* 111), in trust for C. D., of (*address and description*)]. [*Or*, that the £ [*describe stock*], part of £ like [*stock*], in Court to the credit of this action, the account of which, by an order of this Court made in this action and dated the day of , 18 , was ordered to be transferred to the said C. D. (*or as the case may be*)], may stand charged with the payment to the said A. B. of the sum of £ which by a judgment [*or* order] of this Court made in a certain action wherein the said A. B. was plaintiff, and the said C. D. defendant [*or as the case may be*], the said A. B. recovered against the said C. D., together with certain costs as in the judgment [*or* order] mentioned, and of the sum of £ , the amount of the costs as taxed and allowed by one of the taxing masters of this Court, and

(*o*) Although the order *nisi* is obtained *ex parte*, it is usually upon a summons. *Vide supra*, p. 336.

(*p*) The whole of this heading is variable according to circumstances. Where the stock which it is sought to charge is not in Court in a chancery action, and the judgment has been obtained in an action in the Queen's Bench Division, the summons is intituled in the action and in the matter of the Acts. Where the judgment has been obtained in one action in any Division, and the funds are in Court to the credit of another action, the summons is intituled in both actions and in the matter of the Acts. Where the judgment or order has been obtained in the action to which the funds are standing to credit, the summons must be issued and intituled in that action and in the matter of the Acts.

of interest at the rate of £4 per cent. per annum on the said sums from the day of , 18 , until payment, unless the said C. D. shall, within days after service of the order to be made on this application [*or*, on or before the day of , 18 ,] show good cause to the contrary.

Where the stock, &c., sought to be charged are not in Court, add: And that the Governor and Company of the Bank of England [*or* the said (*public company*)] may be restrained from permitting a transfer of the said £ [*describe stock, &c.*] in the meantime, and until the order to be made on this application shall be made absolute or discharged.

Where the stock, &c., sought to be charged are in Court, add: And that no part of the said [*describe stock*] may be sold, transferred, paid out, or otherwise dealt with, without notice to the applicant in the meantime, and until the order to be made on this application shall be made absolute or discharged.

No. 111.—*Form of Affidavit in support of Application for Charging Order over Stock.*

[*Heading, &c.*]

Dan. Ch. Forms, p. 419, No. 1051. *Supra*, p. 335.

1. The above-named defendant C. D. [*or as the case may be*] is justly and truly indebted to me in the sum of £ , upon and by virtue of a judgment [*or* order] in this action [*or*, in a certain action (*insert short title and reference to record of action*) wherein I was plaintiff and C. D. defendant], dated the day of , 18 , and whereby I recovered against the said C. D. the sum of £ [*amount of judgment debt, including costs*], and which judgment [*or* order] is still unsatisfied [*if so, add:* to the extent of £ .]

2. There is now standing in the books of the Governor and Company of the Bank of England the sum of £ reduced £ per centum annuities [*or*, in the books of *the particular public company in which the shares are held* shares in the said company] in the name of the said C. D. in his own right [*or*, in the names of E. F. and G. H. (*address and description*), in trust for the said C. D.], [*or*, There is now in Court to the credit of this action the sum of £ [*describing stock*] part of £ like (*stock*) to the same credit: The account of, &c., which by order dated the day of , 18 , was ordered to be transferred to the said C. D.]

3. I am informed and believe that the said C. D. is beneficially

interested in the said (*stocks or shares sought to be charged*) for his own use and benefit.

4. [*Where practicable justify grounds of belief.*]

No. 112.—*Order charging Stock—Nisi.*

R. S. C., App. K., No. 27. *Supra*, p. 336.

[*Heading.*]

Upon hearing , and upon reading the affidavit of filed the day of , 18 , whereby it appears [*set forth the affidavit sufficiently to show amount due, and description of shares or stock*]:

It is ordered that, unless sufficient cause be shown to the contrary before [the judge in chambers, *or, in the Chancery Division,* Mr. Justice], on day the day of , 18 , at o'clock in the noon, the defendant's interest in the [*describe stock as described in the affidavit in support*] so standing as aforesaid shall, and that it in the meantime do, stand charged with the payment of the above-mentioned amount due on the said judgment.

Dated the day of , 18 .

No. 113.—*Order charging Stock—Absolute.*

R. S. C., App. K., No. 28. *Supra*, p. 337.

[*Heading.*]

Upon hearing , and upon reading the affidavit of (*q*) filed the day of 18 , and an order nisi made herein on the day of 18 , reciting the affidavit of , whereby it appeared [*see recital in order nisi last Form*]: It is ordered that the defendant's interest in the so standing as aforesaid stand charged with the payment of the above-mentioned amount due on the said judgment.

Dated the day of 18 .

No. 114.—*Form of Order in Action for Protection of Stock or Shares charged.*

Generally. *Vide supra*, p. 343 *et seq.* and p. 348.

[*This order may run to a considerable length, for it should, where circumstances demand, provide for ascertaining the value of the interest*

(*q*) As to the evidence required, *vide supra*, p. 335.

charged and proceed to order its sale, and, further, provide for the incident inquiries. The order made in Bristed *v.* Wilkins (3 Ha. 235, see p. 239) *is a good example of such an order.*]

Seton, p. 300. *Supra*, p. 345.

No. 115 —*Stop Order.*

Upon the application of A. [*the person who has obtained the charging order*], and upon hearing the solicitors for the applicants and for B. of , &c. [*the owner of the beneficial interest in the stock or shares charged*], and upon reading an affidavit of filed, &c., and the exhibit therein referred to, and the certificate of the fund; And the applicants by their solicitors submitting to be bound by rule 12 of O. XLVI: Let no part of the £ [*describe stock*], or £ cash in Court to the credit of , &c., or any part thereof, respectively, to which the said B. is or may become entitled, or of any dividends to accrue due thereon, be transferred, sold, paid out, or otherwise disposed of, without notice to the said A. (*r*).

R. S. C., App. B., No. 25.

No. 116.—*Affidavit in support of Application for Garnishee Order.*

In the High Court of Justice.

Division. 18 . No. .

Between Judgment creditor,

and

Judgment debtor.

I of , the above-named judgment creditor [*or*, solicitor for the above-named judgment creditor], make oath and say as follows:—

1. By a judgment of the Court given in this action and dated the day of 18 , it was adjudged that I [*or* the above-named judgment creditor] should recover against the above-named judgment debtor , the sum of £ and costs to be taxed, and the said costs were by a taxing master's certificate dated the day of 18 , allowed at £ .

2. The said still remains unsatisfied to the extent of and interest amounting to £ .

(*r*) For other forms of stop orders, which are, of course, variable to suit the circumstances of the particular settlement, will, &c , under which the stock or shares are held, see Seton, 300 *et seq.*

3. [*Name, address, and description of garnishee*] is indebted (*s*) to the judgment debtor in the sum of £ or thereabouts (*t*).

4. The said is within the jurisdiction of this Court.

Sworn, &c.

No. 117.—*Garnishee Order Nisi* (*Attaching Debt*).

R. S. C., App. K., No. 39.

18 [*here put the letter and number*].

In the High Court of Justice.

Division.

in Chambers.

Between Judgment creditor,

and

Judgment debtor,

Garnishee.

Upon hearing , and upon reading the affidavit of , filed the day of and :

It is ordered that all debts owing or accruing due from the above-named garnishee to the above-named judgment debtor be attached to answer a judgment recovered against the said judgment debtor by the above-named judgment creditor in the High Court of Justice on the day of 18 for the sum of £ , on which judgment the said sum of £ remains due and unpaid.

And it is further ordered that the said garnishee attend the in chambers on day the day of 18 at o'clock in the noon, on an application by the said judgment creditor, that the said garnishee may pay the debt due from him to the said judgment debtor, or so much thereof as may be sufficient to satisfy the judgment.

Dated the day of 18 .

No. 118.—*Garnishee Order Absolute.*

R. S. C., App. K., No. 40. *Supra*, p. 352.

18 [*here put the letter and number*].

In the High Court of Justice.

Division.

in Chambers.

Between Judgment creditor,

and

Judgment debtor,

Garnishee.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and [*the garnishee order nisi*],

(*s*) It is advisable to set forth the manner in which the garnishee is indebted, so as to show that the alleged debt is "a debt owing or accruing." See *Richardson* v. *Elmit*, 2 C. P. D. 9.

(*t*) Actual sum due is not essential. *Lucy* v. *Wood*, W. N. 1884, 58.

whereby it was ordered that all debts owing or accruing due from the above-named garnishee to the above-named judgment debtor should be attached to answer a judgment recovered against the said judgment debtor by the above-named judgment creditor in the High Court of Justice on the day of 18 , for the sum of £ , on which judgment the said sum of £ remained due and unpaid: It is ordered that the said garnishee do forthwith pay the said judgment creditor the debt due from him to the said judgment debtor (or so much thereof as may be sufficient to satisfy the judgment debt), and that in default thereof execution may issue for the same, and that the costs of this application be .

Dated the day of , 18 .

Ch. Arch. Forms, p. 467. *Supra*, p. 354.

No. 119.—*Order under O. XLV., r. 5, for Issue to be tried between Garnishee and Judgment Creditor.*

[*Heading as in preceding form.*]

It is ordered that the said execution creditor and the said garnishee do proceed to the trial of an issue wherein the said execution creditor shall be plaintiff, and the said garnishee shall be defendant, and the question to be tried therein shall be whether the said garnishee was indebted to the judgment debtor at the time the order *nisi* herein was made, viz., on the . And further that the said execution creditor do prepare and deliver the issue to the defendant therein in fourteen days, and the said defendant shall return same approved in seven days. And further that the said issue shall be tried with a jury at the ensuing sittings at . And that the question of costs and any other question that may arise be reserved for further order.

Ch. Arch. Forms, p. 467. *Supra*, p. 354.

No. 120.—*Order under O. XLV., r. 5, for Special Case to be stated between Judgment Creditor and Garnishee.*

[*Heading as in Form No.* 117.]

It is ordered that the question as to the liability of the garnishee herein be tried under and by means of a special case to be agreed on between the parties, such special case to be prepared by the said , and submitted to the said , or his solicitor, within days, and returned approved by the said within days. And that any question which may arise as to the form of such case be submitted to and determined by me, or the Master who shall be sitting at Chambers. And that the question of costs be reserved.

APPENDIX II.

THE SHERIFFS ACT, 1887.

(50 & 51 Vict. c. 55.)

Preliminary.

1. This Act may be cited as the Sheriffs Act, 1887. Short title.

2. This Act shall not extend to Scotland or Ireland. Extent of Act.

Appointment and Qualification.

3. (1.) A sheriff shall be annually appointed for every county. Annual appointment of sheriff and duration of office.

(2.) Save as provided by this Act, a sheriff shall not hold office for more than one year, and a grant after the passing of this Act of the office for more than one year shall be void.

(3.) The office of sheriff or of any officer of a sheriff shall not become void by reason of the demise of the Crown, or in Cornwall of the Duchy of Cornwall, but the person holding the office shall, unless sooner removed or superseded, continue in office for the remainder of his term, in like manner as if such demise had not taken place. *Supra*, p. 69.

4. A person shall not be appointed sheriff nor bailiff of a franchise except he have sufficient land within his county or bailiwick to answer the Queen and her people. Qualification of sheriffs.

5. A person who has been sheriff of a county for a whole year shall not within three years next ensuing be appointed sheriff of that county unless there is no other person in the county qualified to fill the office. Same person not to be chosen twice in three years.

6. (1.) On the twelfth day of November in every year (or if that day fall on a Sunday then on the ensuing Monday) persons fit to serve as sheriffs shall be nominated for every county at the Royal Courts of Justice in the manner that has been heretofore used and observed, and shall be so nominated by the following great officers, namely, the Lord High Chancellor of Great Britain, the Lord High Treasurer, or if there is no Lord High Treasurer, the Chancellor of the Exchequer, the Lord President and others of Her Majesty's Nomination and appointment of sheriffs.

Most Honourable Privy Council, and the Lord Chief Justice of England, or any two or more of such great officers, taking to them the judges of Her Majesty's High Court of Justice, or any two or more of them.

(2.) Whenever Her Majesty has duly pricked a person to be sheriff of a county, the same shall be forthwith notified in the London Gazette; and a warrant in the form in the First Schedule to this Act shall be forthwith made out and signed by the Clerk of the Privy Council and transmitted by him to the person so pricked; and the appointment of sheriff so made shall be of the same effect as if made by patent under the Great Seal; and every sheriff so appointed upon making the declaration of office in this Act mentioned shall by virtue of this Act only and without payment of any fee have and exercise all powers, privileges, and authorities usually exercised and enjoyed by sheriffs of counties in England.

(3.) A duplicate of the said warrant shall within ten days after the date thereof be transmitted by the Clerk of the Privy Council to the clerk of the peace of the county for which such person is appointed sheriff and shall be enrolled and kept by the said clerk of the peace without fee.

(4.) Nothing in this section shall apply to the counties of Cornwall, Lancaster, or Middlesex.

Declaration of office.

7. (1.) Every sheriff shall, before he enters on the execution of his office, make and subscribe a declaration in the form in the Second Schedule to this Act or to the like effect before one of the judges of Her Majesty's High Court of Justice or before a justice of the peace for the county of which he is sheriff.

(2.) Every sheriff shall continue to be and act as sheriff until his successor has made the said declaration and entered upon office.

Powers, Duties and Liabilities.

Powers of sheriff for posse comitatus.

8. (1.) Every person in a county shall be ready and apparelled at the command of the sheriff and at the cry of the country to arrest a felon whether within a franchise or without, and in default shall on conviction be liable to a fine, and if default be found in the lord of the franchise he shall forfeit the franchise to the Queen, and if in the bailiff he shall be liable besides the fine to imprisonment for not more than one year, or if he have not whereof to pay the fine, than two years.

Supra, p. 75.

(2.) If a sheriff finds any resistance in the execution of a writ he shall take with him the power of the county, and shall go in proper person to do execution, and may arrest the resisters and commit

them to prison, and every such resister shall be guilty of a misdemeanour.

Duties at assizes.

9. In the time of the assizes a court of quarter sessions in the county may direct a sufficient number of police constables to be employed to keep order in and within the precincts of the court of assize, and the chief constable shall comply with such direction, but if such direction is not given the sheriff shall have a sufficient number of men servants in liveries attending upon him for the purpose of so keeping order and of protecting the judges of assize.

Duties as to execution of writs.

10. (1.) A sheriff at the request of a person delivering a writ to him for execution shall give a receipt for that writ stating the day of its delivery. [*Supra*, pp. 77, 78.]

(2.) A sheriff shall not return to a writ that he has delivered it to a bailiff of some liberty not heretofore recorded in the Exchequer. *Supra*, p. 76.

Duties on receipt of debt to Crown.

11. (1.) Where a sheriff or his officer or other person employed in collecting by process from any court any debt due to the Crown, receives from any person a sum due to the Crown he shall give a receipt to such person for that sum; and the sheriff, at the next account after a sum due to the Crown has been paid to him or his officer, shall procure the effectual discharge of the debtor paying the same.

(2.) An officer of a sheriff receiving any such sum shall account for it to the sheriff, and the sheriff shall give a receipt for such sum.

(3.) In case of any default under this section, the sheriff and his heirs, executors, and administrators, shall be liable to pay any damages suffered by a debtor in consequence of such default.

Duties as to return of jurors.

12. A sheriff or any officer of a sheriff shall not return in any panel for an inquest or jury any officer or servant of the sheriff or of such officer.

Duties as to execution of judgment of death.

13. (1.) Where judgment of death has been passed upon a convict at any court of assize or any sessions of oyer and terminer or gaol delivery held for any county or riding or division or other part of a county, the sheriff of such county shall be charged with the execution of such judgment, and may carry such judgment into execution in any prison which is the common gaol of his county, or in which the convict was confined for the purpose of safe custody prior to his removal to the place where such court was held, and shall, for the purpose of such execution, have the same jurisdiction and powers over and in the prison in which the judgment is to be carried into execution, whether such prison is or is not situate within his county, and over the officers of such prison, as he has by law over and in the common gaol of his county and

28 & 29 Vict. c. 126.
40 & 41 Vict. c. 21.

the officers thereof, or would have had if the Prison Act, 1865, and the Prison Act, 1877, had not passed, and shall be subject to the same responsibility and duties as if the said Acts had not passed.

39 & 40 Vict. c. 57.
42 & 43 Vict. c. 1.
44 & 45 Vict. c. 64.

(2.) This section shall be in addition to and not in derogation of any power authorized to be exercised by Order in Council under the Winter Assizes Act, 1876, and the Spring Assizes Act, 1879, or either of them, and of the provisions of the Central Criminal Court (Prisons) Act, 1881.

Duties on arrest of civil debtors.
Supra, p. 246.

14. (1.) Where an officer being a sheriff, under-sheriff, bailiff, serjeant-at-mace, or other officer whatsoever, arrests or has in custody any person by virtue of any action, writ, or attachment for debt, such officer shall not—

(a) convey such person without his free consent to any house licensed for the sale of intoxicating liquor, or to the private house of such officer or of any tenant or relation of such officer; nor

(b) charge such person with any sum for, or procure him to call or pay for, any liquor, food, or thing whatsoever, except what he freely asks for; nor

(c) take such person to any prison within twenty-four hours of the time of his arrest, unless such person refuses to be carried to some safe and convenient dwelling-house of his own nomination, not being the private dwelling-house of such person, and being within the borough or town where such person was arrested, or if he was not arrested within a borough or town then within three miles of the place and in the county or franchise in which he was arrested;

but shall at all times permit such person to send for and to have brought to him at reasonable times in the day any food or liquor from what place he thinks fit, and also to have and use such bedding, linen, and other necessary things as he has occasion for or is supplied with, and shall not purloin or detain the same or require any payment for the use thereof or restrict the use thereof.

(2.) Every court of quarter sessions in a county shall from time to time make an order allowing sums which may be taken from prisoners arrested in such county on any action, writ, or attachment, in respect of one or more nights lodging or for a day's diet or for other expenses of such person, and may from time to time vary such order as seems expedient.

(3.) A copy of every such order signed by the clerk of the peace shall be fixed in some conspicuous place in the sessions house or

other proper place of the county as the Court may order, so that the same may be there seen and examined as occasion may require.

(4.) For the purpose of making known the provisions of this section, a printed copy thereof shall be delivered by every sheriff, under-sheriff, secondary of the City of London, and other person entrusted with causing the execution of any writ or attachment, to the bailiff, serjeant-at mace, officer, or other person employed to execute the same.

(5.) It shall be part of the conditions of every security given to any sheriff, or under-sheriff, by any bailiff, serjeant-at-mace, officer, or other person employed to execute any writ or attachment under him, that such bailiff, serjeant-at-mace, officer, and other person will show a printed copy of this section to every person whom he arrests and goes with to any house where intoxicating liquor is sold, and also will permit such person or his friend to read over such copy before any liquor or food is called for or brought to him, and any breach by such bailiff, serjeant-at-mace, officer, or person of such condition shall be a misdemeanor in the execution of the writ or attachment, besides being a breach of the conditions of the security.

Liability for wrongful imprisonment.

15. A person unlawfully imprisoned by a sheriff or any of his officers shall have an action against such sheriff in like manner as against any other person that should imprison him without warrant.

Liability for escape.

16. (1.) If a person in the custody of the sheriff or any of his officers or of any other person, either in execution or for non-performance of a judgment or order of the High Court of Justice, or for contempt of that Court or otherwise in the course of a civil proceeding, escapes out of legal custody, such sheriff or other person shall be liable to pay the damages sustained by the person at whose suit such prisoner was taken into custody, and all costs of any action or other proceeding to recover the same, but not any further sum.

(2.) A sheriff shall not be liable for the escape of any prisoner when confined in any prison subject to the Prison Act, 1877. 40 & 41 Vict. c. 21, s. 31.

Disability to act as justice of the peace.

17. A person shall not, while he is sheriff of a county, act as a justice of the peace for that county, and if he does so act, all his acts done as such justice of the peace shall be void.

Holding of courts.

18. (1.) A sheriff shall not be bound to hold a county court except where the holding of such court is required for the purpose of an election or of the due execution of some writ or for any other specific purpose, in which case he shall hold a court at the time

fixed for such purpose by law or by such writ, or if no time is so fixed, as soon as is reasonably practicable after he is informed of the necessity for holding such court, or receives such writ, and where more than one court is required to be held for any such purpose, he shall hold courts at intervals not exceeding one month from each other.

(2.) A sheriff's county court shall be held at the place heretofore appointed or authorized by law, or at such other place as the sheriff may from time to time fix with the consent of the authority having for the time being power to divide the county into polling districts for the purpose of parliamentary elections.

(3.) A sheriff shall not hold pleas of the Crown, and shall not under any commission or writ take any inquest whereby any person is indicted.

(4.) The sheriff's tourn is hereby abolished.

Letting of county.

19. (1.) A hundred or wapentake shall not as respects the powers and duties of sheriffs be severed from the county.

(2.) A sheriff shall not let to ferm his county or any part thereof.

Fees and poundage.

20. (1.) A sheriff shall be entitled in respect of all sums due to the Crown, and collected by him under process of any court, to an allowance upon his accounts of one shilling and sixpence in the pound for every sum not exceeding one hundred pounds, and of one shilling for every pound exceeding the first hundred pounds.

(2.) Any sheriff or officer of a sheriff concerned in the execution of process directed to the sheriff, other than process for the recovery of the aforesaid sums due to the Crown, may demand, take and receive such fees and poundage as may from time to time be fixed by the Lord Chancellor, with the advice and consent of the judges of the Court of Appeal and High Court of Justice, or any three of them, and with the concurrence of the Treasury.

(3.) Any sheriff or officer of a sheriff, and any officer arresting or having in custody any person by virtue of any action, writ, or attachment, shall not demand or take any reward to do his office, except such remuneration as is given to the sheriff by the Crown, or is given to an officer of the sheriff by the sheriff, and such fees and poundage as are above-mentioned or are allowed by or in pursuance of any other Act, and, save as allowed by this Act, shall not demand or take directly or indirectly any reward for doing his office or duty or for abstaining therefrom, or in respect of the mode in which he does his office or duty.

(4.) Where a sheriff seizes any personal estate for any sum due to the Crown and dies or is superseded before he has sold the same

and his successor sells the same, the poundage and fees due in respect of the seizure and sale shall be apportioned between the preceding and subsequent sheriffs in such manner and proportions as a judge of the High Court of Justice may on application determine, having regard to the expense and trouble that each sheriff had.

Accounts.

Transmission of accounts of sheriff.

21. (1.) Every sheriff shall within two months after the expiration of his office, or in case of the death of any sheriff the under-sheriff by him appointed shall within two months next after the death of such sheriff, transmit to the Treasury a just and true account under his hand—

(a) of all sums received by such sheriff for the use of the Crown, and of all sums paid or claimed by him or on his behalf (including such sums as have been usually inserted in the bill of cravings), with all such particulars as are needful to explain the same; and

(b) of the names and residences of all persons incurring fines, issues, amerciaments, forfeited recognizances, or sums of money which he has been authorized to levy by virtue of any writ issued to him or to any predecessor in office, and if the same have not been levied, the causes of their not having been levied;

and the Treasury may grant a warrant for the allowance of the sums so paid or claimed in the account, or for the payment of such sum of money in respect thereof as they may think reasonable:

(2.) Provided as follows:—

(a) a sheriff or under-sheriff shall not be imprisoned upon any process for not finishing his accounts in due time, or for any contempt or neglect in relation to his accounts, except by a warrant naming such sheriff or under-sheriff and specifying his offence, and issued by one of the judges of the High Court of Justice;

(b) an under-sheriff shall not be personally responsible for any sum received by a deceased sheriff, but the same shall be answered by the representatives of the deceased sheriff or otherwise in due course of law; and

(c) nothing in this section shall alter the right of any body corporate or person under any charter to receive any fines or other sums.

Audit of accounts of sheriff.

22. (1.) All accounts of sheriffs and their under-sheriffs which are transmitted to the Treasury under this Act shall be examined and audited by such persons and in such manner as the Treasury

may from time to time by warrant direct; and the Treasury may by any warrant make such provisions in relation to the transmission, examination, verification, and audit of such accounts, and for ascertaining and determining the balances due from and the discharge of the persons accounting, as to the Treasury may seem proper.

(2.) Every such warrant shall be laid before both Houses of Parliament within fourteen days after the making thereof if Parliament be sitting, and if Parliament be not sitting then within fourteen days after the next meeting of Parliament.

(3.) If under any such warrant it is necessary for a sheriff or under-sheriff to take any oath to any account or any matter relating thereto, such oath, except when the Treasury require his personal examination before the person appointed by them to audit, may be sworn before any judge of Her Majesty's High Court of Justice, or before any master of the Supreme Court of Judicature, or before any commissioner for taking oaths in the Supreme Court of Judicature, or before any justice of the peace.

(4.) If any officer, clerk, or other person concerned in the passing of sheriffs accounts by his wilful act or default hinders any sheriff in passing his accounts, or obtaining his *quietus*, he shall make such satisfaction to the party aggrieved as may be ordered by Her Majesty's High Court of Justice or any judge thereof on complaint made in such summary manner as the said Court may order.

Under-Sheriff and Officers.

Obligation to appoint under-sheriff, and declaration of office by under-sheriff.

Supra, p. 71.

23. (1.) Every sheriff shall within one month after the notification of his appointment in the London Gazette by writing under his hand appoint some fit person to be his under-sheriff, and shall transmit a duplicate of such written appointment to the clerk of the peace for the county, which shall be filed by him among the records of his office.

(2.) For filing such duplicate the clerk of the peace shall be entitled to demand and receive from the under-sheriff such fee as may be from time to time fixed in pursuance of the enactments relating to fees of clerks of the peace, and until any fee is so fixed a fee of five shillings.

(3.) Every under-sheriff shall before he enters on the execution of his office make a declaration in the form in the Second Schedule to this Act or to the like effect before one of the judges of Her Majesty's High Court of Justice, or before a justice of the peace for the county for which such under-sheriff is appointed.

Obligation to appoint deputy resident in London.

24. Every sheriff shall appoint a sufficient deputy, who shall be resident or have an office within one mile from the Inner Temple Hall, for the receipt of writs, the granting of warrants thereon, the making of returns thereto, and the acceptance of all rules and orders to be made on or touching the execution of any process or writ to be directed to such sheriff.

Supra, pp. 70, 77.

Execution of office by under-sheriff on death or suspension of sheriff.

25. (1.) Where the sheriff of a county dies before the expiration of his year of office or before he is lawfully superseded, the under-sheriff by him appointed shall nevertheless continue in office and shall until another sheriff be appointed for the said county and has made the declaration of office, execute the office of sheriff, in the name of the deceased sheriff, and be answerable for the execution of the said office as the deceased sheriff would by law have been if living; and the security given to the sheriff so deceased by the said under-sheriff and his pledges shall remain and be a security to the Crown and to all persons whomsoever for such under-sheriff's due execution of the offices of sheriff and under-sheriff.

Supra, p. 71.

(2.) When it becomes the duty of an under-sheriff to act as sheriff under the provisions of this section he may by writing under his hand appoint a deputy.

Supra, p. 71.

Declaration by bailiffs, &c.

26. Every deputy bailiff and officer of a sheriff or under-sheriff, and every other person who has authority or takes upon himself to impanel or return any inquest, jury, or tales, or to intermeddle with the execution of writs issued by any Court of record, shall before he does so make a declaration (which shall be exempt from stamp duty) in the form in the Second Schedule to this Act, or to the like effect before any judge of the High Court of Justice or justice of the peace for the county or borough in which he exercises such authority.

Supra, p. 73.

Sale of offices prohibited.

27. (1.) A person shall not directly or indirectly by himself or by any person in trust for him or for his use buy, sell, let, or take to ferm the office of under-sheriff, deputy-sheriff, bailiff, or any other office or place appertaining to the office of sheriff, nor contract for, promise, or grant for any valuable consideration whatever any such office or place, nor give, promise, or receive any valuable consideration whatever for any such office or place.

(2.) Any person who acts in contravention of this section, not being an under-sheriff, deputy-sheriff, bailiff or officer of a sheriff, shall be liable to the same punishment as if he were an under-sheriff, deputy-sheriff, bailiff, or officer.

(3.) Provided that this section shall not prevent the sheriff or under-sheriff from demanding and taking the lawful fees and perquisites of the office of sheriff or of any place or employment belong-

ing thereto, nor from taking security for duly answering for the same, and shall not prevent any officer of a sheriff from accounting to the sheriff for the fees and perquisites received by him in respect of his office, nor from giving security so to account, and shall not prevent a sheriff from giving nor an officer from receiving a salary or remuneration for the execution of his office.

Outgoing Sheriff.

Outgoing sheriff to turn over prisoners and process to incoming sheriff.

Supra, p. 69.

28. (1.) Every sheriff shall at the expiration of his term of office make out and deliver to the incoming sheriff a correct list and account under his hand of all prisoners in his custody and of all rolls and writs in his hands not wholly executed by him, with all such particulars as may be necessary to explain to the incoming sheriff the several matters intended to be transferred to him, and shall thereupon turn over and transfer to the custody of the incoming sheriff all such prisoners, rolls and writs, and all records, books, and matters appertaining to the office of sheriff.

Supra, p. 69.

(2.) The incoming sheriff shall thereupon sign and give to the outgoing sheriff a duplicate of such list and account, which shall be a good and sufficient discharge to him of and from all the prisoners therein mentioned and the execution of the writs and other matters therein contained; and thereupon the incoming sheriff shall stand charged with the said prisoners and with the execution and care of the said rolls, writs and other matters contained in the said list and account.

Supra, p. 70.

(3.) A sheriff shall not be called upon to make a return of any writ after the expiration of six months from the date at which he ceases to hold his office.

Miscellaneous.

Punishment for misconduct.

Supra, p. 68.

29. (1.) If a person being a sheriff, under-sheriff, bailiff, or officer of a sheriff, whether within a franchise or without, does any of the following things, that is to say—

(a) conceals or procures the concealment of any felon; or

(b) refuses to arrest any felon in his bailiwick; or

(c) lets go at large a prisoner who is not bailable; or

(d) is guilty of an offence against or breach of the provisions of this Act,

he shall (without prejudice to any other punishment under the provisions of this Act) be guilty of a misdemeanor, and be liable on conviction to imprisonment for a term not exceeding one year and to pay a fine, or if he has not wherewith to pay a fine, to imprisonment for a term not exceeding three years.

Supra, p. 160.

(2.) If any person being either a sheriff, under-sheriff, bailiff, or

officer of a sheriff, or being employed in levying or collecting debts due to the Crown by process of any Court, or being an officer to whom the return or execution of writs belongs, does any of the following things, that is to say—

(a) withholds a prisoner bailable after he has offered sufficient security; or

(b) takes or demands any money or reward under any pretext whatever other than the fees or sums allowed by or in pursuance of this or any other Act; or

(c) grants a warrant for the execution of any writ before he has actually received that writ; or

(d) is guilty of any offence against or breach of the provisions of this Act, or of any wrongful act or neglect or default in the execution of his office or of any contempt of any superior court;

he and any person procuring the commission of any such offence shall, without prejudice to any other punishment under the provisions of this Act, but subject as hereinafter mentioned, be liable—

(i.) to be punished by the Court as hereinafter mentioned; and

(ii.) to forfeit two hundred pounds, and to pay all damages suffered by any person aggrieved,

and such forfeiture and damages may be recovered by such person as a debt by an action in Her Majesty's High Court of Justice.

(3.) Any of the following Courts, that is to say, Her Majesty's High Court of Justice, any court of assize, oyer and terminer or gaol delivery, or any judge of any of the said Courts, also where the alleged offence has been committed in relation to any writ issued out of any other court of record than those above-mentioned, the Court out of which such writ issued, may, on complaint made of any such offence as aforesaid having been committed and on proof on oath given by the examination of witnesses or by affidavit or on interrogatories of the commission of the alleged offence, and after hearing any thing which the alleged offender may urge in his defence (which evidence and hearing may be taken and had in a summary manner) punish the offender or cause proceedings to be taken for his punishment in like manner as a person guilty of contempt of the said Court may be punished. *Supra*, p. 161.

(4.) The Court may order the costs of or occasioned by any such complaint to be paid by either party to the other and an order by the High Court of Justice in any such summary proceeding to pay any costs, damages, or penalty shall be of the same effect as a judgment of the High Court, and may be enforced accordingly. *Supra*, p. 161.

(5.) Any of the said Courts being a superior court of record may also proceed for and deal with such offence in like manner as for any contempt of such Court.

Supra, p. 161.

(6.) If any person not being an under-sheriff, bailiff, or officer of a sheriff, assumes or pretends to act as such, or demands or takes any fee or reward under colour or pretext of such office, he shall be guilty of contempt of Her Majesty's High Court of Justice, and be liable to be punished in manner provided by this section as if he were an under-sheriff guilty of a contempt of such Court.

Supra, p. 161.

(7.) Any proceeding in pursuance of this section against a sheriff, under-sheriff, or any other person to whom this section applies shall be taken within two years after the alleged offence was committed and not subsequently, and if the proceeding is in a summary manner shall be taken before the end of the sittings of the Court held next after the offence was committed and not subsequently.

(8.) Nothing in this section shall render a person liable to be punished twice in respect of the same offence, but if any proceeding is taken against a person under this section for any offence the Court or judge may postpone or stay such proceeding and direct any other available proceeding to be taken for punishing such offence.

Filing and exemption from duty of declaration of office.

30. (1.) Every declaration of office made under this Act by a sheriff of a county or his under-sheriff shall be exempt from stamp duty and be transmitted to the clerk of the peace for the county, and be by him filed among the records of his office.

(2.) For filing such declaration the clerk of the peace shall be entitled to demand and receive from such sheriff or under-sheriff such fee as may be from time to time fixed in pursuance of the enactments relating to fees of clerks of the peace, and until any fee is so fixed a fee of five shillings.

Application of Act in Special Cases.

Application of Act to Westmoreland and Wales.

31. Save as otherwise expressly provided by this or any other Act the law relating to sheriffs, inclusive of this Act and of the law relating to the election of members to serve in parliament, shall extend to the Counties Palatine, to the County of Westmoreland, and each county in Wales in the same manner in all respects as to other counties in England, and the respective sheriffs of the above-mentioned counties shall have the like powers, duties, jurisdiction, and liabilities, as the sheriff of any other county in England.

Application of Act to Cambridge and Huntingdon.

32. One sheriff may continue as heretofore to be appointed for the counties of Cambridge and Huntingdon as if they were one county.

Saving for privileges of city of London and approval of election of sheriffs of Middlesex and London.

33. (1.) Nothing in this Act shall affect the privilege of the mayor, commonalty and citizens of the city of London to elect the sheriff of Middlesex and sheriffs of London.

(2.) Unless otherwise directed by order of Her Majesty in Council, warrants signifying the approval by Her Majesty of the election of the sheriff of Middlesex and sheriffs of London shall be prepared under the seal of the Chancellor of the Exchequer at the central office of the Supreme Court of Judicature, which warrants may be delivered to the said sheriffs or their duly authorized agents without fee on the thirtieth day of September or between that day and the twelfth day of November in every year, and an entry of the grant of such warrants shall be made on the roll of the Court, and unless such warrant be stayed by order of Her Majesty in Council on or before the said thirtieth day of September, the election of such sheriff or sheriffs shall be deemed to be approved by Her Majesty.

(3.) All warrants and documents relating to the said sheriff or sheriffs which heretofore have been filed and recorded in the central office of the Supreme Court of Judicature shall continue to be so filed and recorded.

(4.) Save as aforesaid and save as regards the maintenance of men servants and the duration of office, this Act shall apply to the sheriff of Middlesex and sheriffs of London in like manner as to any other sheriff.

Application of Act to franchises. *Supra*, pp. 75 *et seq.*, for process in a franchise.

34. Where a lord of a franchise or any other person or body corporate has in any franchise, that is to say, any liberty, hundred, franchise, or other part of a county, the return or execution of writs, or any other of the privileges or duties of a sheriff, the following provisions shall apply to such lord, person, or body corporate (in this Act referred to as the bailiff of a franchise) that is to say—

(a) The bailiff of a franchise shall either hold the office himself, or shall put in bailiffs having land in the bailiwick sufficient to answer the Queen and her people, and shall answer for such bailiffs; and every such last-mentioned bailiff shall make the like declaration as an under-sheriff;

(b) The sheriff of the county within which such franchise is situate shall within one month after a request made in that behalf by such lord appoint some sufficient deputy at such cost to be paid by the said lord, and to reside at such convenient place in or near the franchise, as may be appointed from time to time by the Lord High Chancellor of Great

Britain and the Lord Chief Justice of England or one of them;

(c) Every deputy so appointed shall reside at the said place, and in the sheriff's name shall receive and open, when tendered to him, all writs, the execution or return of which belongs to the bailiff of the franchise, and shall, without delay, issue to the said bailiff under the seal of the sheriff, and in such manner and form as the sheriff himself ought to do, the warrant required by law for the due execution of the said writs;

(d) The bailiff of the franchise and not the sheriff shall be liable for the non-execution, mis-execution, or insufficient return of any writs, or for any misconduct in the performance of the said office or for any breach of the provisions of this Act; and any fine imposed on the bailiff of the franchise or his bailiff or officer shall notwithstanding any grant be paid to the Crown; and

(e) All the provisions of this Act (except as hereinafter mentioned) and every such enactment in any other Act as relates to the return of panels or juries, or to the due execution of any writ, or to the taking of fees, or to any extortion by sheriffs or their officers, or otherwise to the office and duties of sheriffs or their officers shall, together with all the liabilities, punishments and forfeitures thereby imposed, extend to such bailiff of the franchise and his bailiffs and officers in like manner as if he and they were a sheriff or sheriff's bailiffs and officers; provided that the enactment as to the appointment and duration of office of a sheriff shall not apply, and such bailiff of the franchise and his bailiff shall be entitled to hold his office as long as he would have been entitled if this provision had not been enacted;

Supra, p. 76. (f) In the case of the non-return of a writ, if the sheriff returns that he has delivered the writ to a bailiff of a franchise, the sheriff shall be ordered to execute the writ notwithstanding the said franchise; and further to cause the bailiff of such franchise to attend before the High Court of Justice and answer why he did not execute the said writ.

Duties of bailiffs of liberties and constables.

35. Every bailiff of a franchise within the meaning of the foregoing provisions of this Act, who, in times past, has been used or ought by himself or a bailiff to attend upon justices of assize or of gaol delivery and justices of the peace at large in any county shall continue so to attend and execute all writs directed to him for the administration of justice in such franchise, and shall give his

attendance upon and assistance to the sheriff at all courts of gaol delivery from time to time for the execution of prisoners.

Application of Act to sheriffs of counties of cities and counties of towns. 45 & 46 Vict. c. 50.

36. (1.) The sheriff of a county of a city or a county of a town other than London shall continue to be appointed in manner provided by the Municipal Corporations Act, 1882, and shall hold office for the term in that Act mentioned, and in the event of the death or incapacity of a sheriff so appointed, the council of the said city or town shall forthwith appoint another fit person to execute the office;

(2.) A person may be appointed to be such sheriff if he have sufficient property, whether of land or personalty, to answer the Queen and her people;

(3.) Every such sheriff shall perform the same duties as heretofore, and may receive such fees and remuneration out of the borough fund or other accustomed fund as have heretofore been accustomed;

(4.) Save as aforesaid this Act shall apply to a sheriff of a county of a city or a county of a town in like manner, as nearly as may be, as it applies to the sheriff of a county, and any jurisdiction by this Act vested in the justices in general or quarter sessions may be exercised, so far as regards constables, by the council, and so far as regards other matters by the recorder of the said city or town.

Saving for Duchy of Cornwall.

37. Nothing in this Act shall be prejudicial to the rights of the Crown in right of the Duchy of Cornwall, or to the Duke of Cornwall when there is a Duke of Cornwall.

Definitions and Repeal.

Definitions.

38. In this Act unless the context otherwise requires—

The expression "the Treasury" means the Commissioners of Her Majesty's Treasury.

The expression "county" means a county at large, and does not include a county of a city or a county of a town.

The expression "writ" includes any process.

The expression "quarter sessions" includes general sessions.

Repeal.

39. The Acts specified in the third schedule to this Act are hereby repealed to the extent in the third column of the said schedule mentioned:

Provided that—

(1.) This repeal shall not affect,—

(a) anything duly done or suffered under any enactment hereby repealed; or

(b) any right acquired, or obligation or liability incurred under any enactment hereby repealed; or

(c) the right of any city or borough under any charter; or

(d) any such power, right, privilege, obligation, liability, or duty of any sheriff or officer of a sheriff as exists by common law at the passing of this Act; or

(e) any penalty or punishment incurred in respect of any offence committed against any enactment hereby repealed; or

(f) any legal proceeding or remedy in respect of any such right, obligation, liability, power, right, privilege, duty, penalty or punishment as aforesaid; and any such legal proceeding and remedy may be carried on and had as if this Act had not been passed; and

(2.) This repeal shall not revive or restore any jurisdiction, office, duty, franchise, liberty, custom, privilege, practice, or procedure, or other matter or thing not existing or in force; and

(3.) Every sheriff, under-sheriff, bailiff, and officer holding office at the passing of this Act shall continue to hold such office, and be subject to be discharged therefrom in like manner, and shall have the same privileges, and be subject to the same duties and liabilities, as if this Act had not passed; and

(4.) Any warrant, order, rules, or other matter or thing made in pursuance of any enactment hereby repealed shall continue and be of the same effect as if made in pursuance of this Act; and

Supra, pp. 107, 156, 159.

(5.) Any fees or poundage authorised to be taken by or in pursuance of any enactment hereby repealed may continue to be taken until altered in pursuance of this Act.

Saving for courts leet, &c.

40. (1.) Notwithstanding the repeal of any enactment by this Act every court leet, court baron, law day, view of frankpledge, or other like court which is held at the passing of this Act shall continue to be held on the days and in the places heretofore accustomed, but shall not have any larger powers, nor shall any larger fees be taken thereat than heretofore, and any indictment or presentment found at such court shall be dealt with in like manner as heretofore.

(2.) Where any enactment repealed by this Act applied to any coroner, escheator, or other officer, he shall continue to be governed by such enactment in like manner as if it had not been repealed; Provided that any enactment of this Act which is substituted as regards a sheriff or sheriff's officer for the enactment so repealed, shall apply to such coroner, escheator, or officer, in lieu of the enactment so repealed.

APPENDIX III.

TABLE OF FEES.

A Table of Fees to be taken by the Sheriffs, Under-Sheriffs, Deputy-Sheriffs, Sheriffs' Agents, Bailiffs, and others the Officers or Ministers of Sheriffs in England and Wales, pursuant to 1 *Vict. c.* 55 (*u*).

[These fees can only be levied where the sum recovered or awarded can be levied, and therefore sheriff has no right to sell for these fees only (*x*).]

For every Warrant (*y*) which shall be granted by the sheriff to his officers upon any writ or process:—	£	*s.*	*d.*
In London and Middlesex - - - -	0	2	6
And on Crown (*z*) and outlawry process, an additional	0	2	6
In all other counties where the most distant part of the county shall not exceed 100 miles from London (*a*) - - - - - -	0	5	0
Not exceeding 200 miles - - - -	0	6	0
Exceeding 200 miles - - - - -	0	7	0
For an arrest in London (*b*) - - - -	0	10	6
In Middlesex, not exceeding a mile from the General Post Office - - - - - -	0	10	6
Not exceeding seven miles from the same place -	1	1	0

(*u*) These fees do not include poundage. They are recoverable from the execution creditor when earned, and can be levied for. O. XLII. r. 15, *vide supra*, p. 158 *et seq.*

(*x*) *Sneary* v. *Abdy*, 1 Ex. D. 299.

(*y*) No other fees on warrants. See *Dew* v. *Parsons*, 2 B. & Ald. 562.

(*z*) So much of this table as relates to process at the suit of the Crown is annulled. Reg. Gen. 16 Nov. 1846.

(*a*) This fee is usually paid to the officer by the solicitor of the execution creditor on lodging a writ of *fi. fa.*, and is included in his charge of £1 : 5*s.* 0*d.* for execution. See Scott's Costs, p. 849, n. (*b*).

(*b*) This table, so far as it relates to arrest, applies of course to a writ of attachment.

	£	s.	d.
In other counties, not exceeding a mile from the officer's residence	0	10	6
Not exceeding seven miles	1	1	0
Exceeding seven miles	1	11	6
For conveying the defendant to gaol from the place of arrest - per mile	0	1	0
For an undertaking to give a bail bond	0	10	6
For a Bail Bond:—			
If the debt shall not exceed £50	0	10	6
100	1	1	0
150	1	11	6
300	2	2	0
400	3	3	0
500	4	4	0
If it shall exceed - - 500	5	5	0
For receiving money under the statute upon deposit for arrest, and paying the same into Court, if in London or Middlesex	0	6	8
If in any other county	0	10	0
For filing the Bail Bond:—			
If the arrest be made in London or Middlesex	0	2	0
If in any other county	0	4	0
Assignment of Bail or other Bond:—			
If in London or Middlesex	0	5	0
If in any other county (including postage)	0	7	6
For the return to any writ of habeas corpus, if one action	0	12	0
And for each action after the first	0	2	6
For the bailiff to conduct prisoners to gaol per diem	0	10	6
And travelling expenses - per mile	0	1	0
For searching offices for detainer (*c*)	0	1	0
Bailiff's messenger for that purpose (*c*)	0	2	6
To the bailiffs for executing warrants on extent, *capias utlagatum*, *levari facias*, *fi. fa.*, *ca. sa.*, *ne exeat*, attachment, elegit, writ of possession, forfeited recognizance, process from pipe office, and other like matters, for each, if the distance from the sheriff's office or the bailiff's residence do not exceed five miles	1	1	0
If beyond that distance (*d*), per mile	0	0	6

(*c*) Not chargeable on a *fi. fa.* 130. *Masters* v. *Lowther*, 21 L. J. C. P.

(*d*) *Gill* v. *Jose*, 6 El. & Bl. 718.

	£	s.	d.
On distringas in London	0	5	0
In Middlesex, not exceeding five miles from General Post Office	0	5	0
Exceeding five miles	0	10	0
For each man (*e*) left in possession, when absolutely necessary (*f*)—			
If boarded per diem	0	3	6
If not boarded per diem	0	5	0
For every sale by auction, notwithstanding the defendant should become bankrupt or insolvent, where the property sold does not produce more than 300*l.*, 5 per cent.; 400*l.*, 4 per cent.; 500*l.*, 3 per cent.; and where it exceeds 500*l.*, $2\frac{1}{2}$ per cent (*g*).			
For the certificate of sale to save auction duty (*h*)	0	2	6
Bond of indemnity besides stamp	1	10	0
Certificate of execution having issued for record	0	5	0
On Writs of Trial and Inquiry (*i*):—			
For a deputation	1	1	0
On lodging writ for entering cause and warrant for summoning jury, which fee shall be forfeited in case of countermand of trial	0	4	0
On Trial or Inquisition:—			
Sheriff for presiding	1	1	0
Bailiff for summoning jury and attendance in Court	0	4	0
And if not held at the office of the under-sheriff—			
For hire of room if actually paid, not exceeding	0	10	0
For travelling expenses of under-sheriff from his office to place where trial or inquisition held, per mile	0	1	0
To the bailiff from his residence, per mile	0	0	6

(*e*) *Masters* v. *Lowther*, 21 L. J. C. P. 130. A second man in possession is seldom necessary. See *Halliwell* v. *Heywood*, 10 W. R. 789; *Long* v. *Bray*, 10 W. R. 841.

(*f*) *Re Grubb, Ex parte Sims*, 4 Ch. D. 521; 5 Ch. D. 375. Possession retained by agreement between parties, *Underden* v. *Burgess*, 4 Dowl. 104; *Levy* v. *Champneys*, 4 Ad. & E. 365.

(*g*) It would appear that the sheriff has a legal right to recover this commission, and that it covers the expenses incident to the sale, such as advertisements (*Braithwaite* v. *Marriott*, 32 L. J. Ex. 24; 1 H. & C. 591); notwithstanding that the Bankruptcy Act, 1883, by sect. 145, requires the sale to be made by auction where the execution is for a sum exceeding 20*l.* *Vide supra*, p. 124. The commission is calculated on the amount realized by the sale. *Davies* v. *Edmonds*, 12 M. & W. 31; 13 L. J. Exch. 1.

(*h*) Now repealed. See 8 Vict. c. 15.

(*i*) These proceedings are now obsolete. Formerly the sheriff had an extensive jurisdiction as judge. 1 Reeves' Hist. 361.

	£	s.	d.
In all cases where it shall appear to the master that a saving of expense has accrued to the parties by reason of writ of trial having been executed by deputation, the fee for such deputation shall be allowed.			
On Writs of Extent, *Elegit*, *Capias utlagatum*, and others of the like nature:—			
For summoning jury, use of room, presiding at the inquisition, &c. - - - - -	2	2	0
Jury - - - - - - - -	0	12	0
For travelling expenses of under-sheriff from his office to place of inquisition, per mile - - -	0	1	0
For drawing and engrossing the inquisition, per folio	0	1	6
For summons for the attendance of a witness- -	0	5	0
In Replevin:—			
Bond upon the same scale as the bail bond.			
Precept to bailiff - - - - -	0	2	6
Notice for service on defendant - - -	0	2	6
Broker where the sum demanded and due shall exceed 20*l.* and shall not exceed 50*l.*, for appraisement and affidavit of value - - - -	0	10	6
Where it shall exceed 50*l.* - - - -	1	1	0
And his travelling expenses from his residence to the place where the goods are per mile	0	0	6
Bailiff for summoning parties and delivering goods to tenant - - - - - -	1	1	0
And his travelling expenses same as broker.			
For the warrant, record, and return of a *re. fa. lo.*, *accedas ad curiam pone*, or writ of false judgment - - - - - -	0	16	6
For writ of *retorno habendo* - - - -	0	4	6
For each summons on a writ of *sc. fa.* or for service of writ of *capias* where no arrest- - -	0	5	0
And mileage per mile - - - -	0	1	0
For recording each demand or proclamation under writs of outlawry- - - - -	0	2	0
For bailiff for making each demand or proclamation on writs of outlawry in London and Middlesex -	0	2	6
In other counties - - - - -	0	5	0
And travelling expenses if the distance shall exceed five miles, then for every mile beyond that distance	0	0	6
For any *supersedeas*, writ of error, order, *liberati*, or discharge to any writ or process, or for the release			

	£	s.	d.
of any defendant in custody (unless in the prison of the county) or of any goods taken in execution (*k*)-	0	4	6
For the return of any writ or process and filing same, exclusive of the fee paid on filing - -	0	1	0

For any duty not herein provided for such sum as one of the masters of the Courts of King's Bench or Exchequer, or one of the prothonotaries of the Court of Common Pleas may upon special application allow (*l*).

(*k*) This does not apply where the sheriff's officer is paid out on a *fi. fa.* *Masters* v. *Lowther*, 21 L. J. C. P. 130; 16 Jur. 374.

(*l*) *E. g.*, expense of keeping horses seized. *Gaskell* v. *Sefton*, 14 M. & W. 802; 15 L. J. Ex. 107.

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